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Supreme Court of the United States

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state public utility commission's action interpreting or enforcing an interconnection agreement under the Telecommunications Act of 1996 is a "determination under [47 U.S.C. § 252]" and therefore reviewable in federal district court under 47 U.S.C. § 252(e)(6).

2. Whether, if 47 U.S.C. § 252(e)(6) does not apply, a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's action interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996.

3. Whether a state public utility commission waives its Eleventh Amendment immunity to federal district court review when it voluntarily exercises federal regulatory authority under 47 U.S.C. § 252.

4. Whether the *Ex parte Young* doctrine permits an action against the members of a state public utility commission in their official capacity to enjoin ongoing violations of federal law in their performance of federal regulatory functions.

LIST OF PARTIES TO THE PROCEEDING BELOW

The parties in the court of appeals were as follows:

American Communications Services of Maryland, Inc.

Bell Atlantic-Maryland, Inc. (now Verizon Maryland Inc.)

Susanne Brogan, in her official capacity as Commissioner of the Public Service Commission of Maryland

E. Mason Hendrickson, in his official capacity as Commissioner of the Public Service Commission of Maryland

Glenn F. Ivey, in his official capacity as Chairman of the Public Service Commission of Maryland

Claude M. Ligon, in his official capacity as Commissioner of the Public Service Commission of Maryland

MCI WorldCom, Inc.

MCImetro Access Transmission Services, Inc.

Maryland Office of People's Counsel

Public Service Commission of Maryland

RCN Telecom Services of Maryland, Inc.

Catherine I. Riley, in her official capacity as Commissioner of the Public Service Commission of Maryland

Starpower Communications, LLC

TCG-Maryland

United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Verizon Maryland Inc. states the following:

Verizon Maryland Inc. (formerly Bell Atlantic-Maryland, Inc.) is a wholly owned subsidiary of Verizon Communications Inc., a publicly held company. No publicly held company owns 10% or more of the stock of Verizon Communications Inc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a) is reported at 240 F.3d 279. The opinion of the district court (Pet. App. 73a-90a) is not reported The order of the Maryland Public Service Commission (Pet. App. 91a-111a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, the relevant provisions of the Telecommunications Act of 1996 and the Federal Communications Commission's implementing regulations, and 28 U.S.C. § 1331 are set forth at Pet. App. 112a-134a.

STATEMENT OF THE CASE

The Fourth Circuit in this case decided four separate questions in a manner that squarely conflicts with the decisions of every other circuit to have decided those questions. The court of appeals held, in the following order:

(1) A state public utility commission that elects to exercise federal regulatory authority under 47 U.S.C. § 252 does not thereby waive its Eleventh Amendment immunity to federal court review. Pet. App. 14a-21a.

(2) The *Ex parte Young* doctrine does not permit an action against the members of a state public utility commission in their official capacity to enjoin ongoing violations of federal law in their performance of federal regulatory functions under 47 U.S.C. § 252. Pet. App. 21a-30a.

(3) A state public utility commission's actions interpreting or enforcing an interconnection agreement under the Telecommunications Act of 1996 is not a "determination" under 47 U.S.C. § 252 and therefore is not reviewable in federal court under § 252(e)(6). Pet. App. 30a-47a.

(4) Where 47 U.S.C. § 252(e)(6) does not itself provide subject matter jurisdiction, a federal district court lacks independent subject matter jurisdiction under 28 U.S.C. § 1331 to review a state commission's actions that allegedly violate the Telecommunications Act of 1996. Pet. App. 47a-50a.

The first three of those holdings — on waiver, *Ex parte Young*, and the scope of § 252(e)(6) — raise questions substantially identical to those on which this Court granted certiorari in *Mathias v. WorldCom Techs., Inc.*, No. 00-878 (Mar. 5, 2001). At a minimum, therefore, this petition should be held pending the Court's decision in *Mathias*.

But this case also presents a fourth question — not at issue in *Mathias* — that independently and urgently warrants this Court's review. In holding that 28 U.S.C. § 1331 gives a federal district court no independent subject matter jurisdiction to review a state commission's actions that violate the Telecommunications Act of 1996, the Fourth Circuit opened a direct and acknowledged conflict with the Sixth Circuit's contrary holding in *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir.), *cert. denied*, 121 S. Ct. 380 (2000). This Court should review the Fourth Circuit's ruling on that question not only because it creates a clear circuit split, but also because the resulting jurisdictional uncertainty jeopardizes the uniform and coherent administration of the 1996 Act.

If this Court were to rule in *Mathias* that a state commission's interpretation or enforcement of an interconnection agreement is not a "determination" reviewable under § 252(e)(6), the next question, logically antecedent to the Eleventh Amendment questions, would be whether a district court may nonetheless exercise federal-question jurisdiction under § 1331. But because that question is not presented by *Mathias*, the Court would have to postpone its consideration of that issue, presumably together with the Eleventh Amendment issues, to another case. By granting this petition now — at least as to questions 2, 3, and 4 — the Court would put itself in a position to

resolve the § 1331 issue concurrently with its resolution of the § 252(e)(6) issue. Then, if the Court determines that § 252(e)(6) does not apply to interpretation or enforcement decisions but that § 1331 provides an independent source of subject matter jurisdiction, it will be able to reach the Eleventh Amendment issues on which the circuits are divided.

The alternative — holding this case pending a decision on the § 252(e)(6) issue and granting certiorari only then — would significantly delay a final determination of jurisdictional and constitutional questions crucial to the integrity of the 1996 Act's scheme for increasing competition in local telecommunications markets. For that entire period, parties aggrieved by a state commission's decision interpreting or enforcing an interconnection agreement would be deprived — at least in states within the Fourth Circuit's territory[1] — of a federal judicial forum for review of the federal issues raised by such a decision. Delay so prolonged, in the context of a statute suffused with commands for urgent action,[2] would itself negate important congressional objectives.

We therefore urge the Court to grant this petition and set the case for argument in tandem with *Mathias*.

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[1] The Fourth Circuit's jurisdiction extends to Maryland, North Carolina, South Carolina, Virginia, and West Virginia. 28 U.S.C. § 41.

[2] For example, the 1996 Act prescribes tight deadlines for each stage of the negotiation, arbitration, and approval process leading up to an interconnection agreement. *See* 47 U.S.C. § 252(a)(1), (b)(1), (b)(3), (b)(4)(C), (e)(4).

1. The Role of State Commissions Under the 1996 Act

In the 1996 Act, Congress imposed a set of substantive duties on all local exchange carriers, 47 U.S.C. § 251(b), and an additional set of duties on *incumbent* local exchange carriers, *id.* § 251(c),[3] designed to accelerate the development of competition in local telephone markets. Among other things, the Act requires incumbent carriers and new entrants to negotiate the terms of agreements to fulfill the duties imposed by § 251(b) and (c). *Id.* § 251(c)(1).

Though Congress could have reserved to the federal government all regulatory authority over the Act's requirements, it chose instead to give state public utility commissions an opportunity to exercise a portion of that federal authority by voluntarily electing to administer the 1996 Act's scheme for inter-carrier agreements. If the parties to a compulsory negotiation reach agreement on mutually acceptable terms, the resulting agreement (subject to state commission approval) is "binding" as a matter of federal law. *Id.* § 252(a)(1). On the other hand, if the parties are unable to agree, either party may petition the state commission under § 252(b) to arbitrate any "open issues." In that case, it is for the state commission to resolve those issues and "impos[e] conditions" in accordance with "the requirements of section 251 . . . , including the regulations prescribed by the [Federal Communications Commission] pursuant to section 251." *Id.* § 252(c)(1).

All such agreements, whether "adopted by negotiation or arbitration[,] shall be submitted for approval to the State commission." *Id.* § 252(e)(1). The state

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[3] In general terms, "incumbent local exchange carriers" are those who, like petitioner Verizon Maryland Inc., were providing local telephone service on the date of enactment. 47 U.S.C. § 251(h).

commission must approve any negotiated terms unless they discriminate against a third-party telecommunications carrier or are inconsistent with the public interest. *Id.* § 252(e)(2)(A). In contrast, the state commission may reject any arbitrated terms if it finds that they "do[] not meet the requirements of section 251 . . . , including the regulations prescribed by the [FCC] pursuant to section 251 . . . , or the standards set forth in [§ 252(d)]." *Id.* § 252(e)(2)(B). Once an agreement is approved, the state commission has continuing "responsibility" under § 252 to "interpret and enforce" the agreement. Memorandum Opinion and Order, *Starpower Communications, LLC*, 15 FCC Rcd 11277, 11279-80, ¶ 6 (2000); *see also Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("we can reach no conclusion but to agree with the FCC's determination that the state commissions' power to enforce interconnection agreements springs from § 252").

The 1996 Act does not *require* states to participate in this process. If a state chooses not "to carry out its responsibility under this section," the FCC "shall issue an order preempting the State commission's jurisdiction . . . and shall assume the responsibility of the State commission." 47 U.S.C. § 252(e)(5).[4] The state suffers no penalty in that event: the FCC proceeding and judicial review of that proceeding "shall be the exclusive remedies for a State commission's failure to act." *Id.* § 252(e)(6).

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[4] The option of declining to participate in the federal regulatory program is not a mere theoretical possibility offering states no genuine choice. The Virginia State Corporation Commission, for example, recently chose not to resolve a dispute between Bell Atlantic-Virginia, Inc. and Starpower Communications over the interpretation and enforcement of their interconnection agreement. The FCC, acting under § 252(e)(5), accordingly stepped in to assume the state commission's responsibility. *See Starpower Communications, LLC*, 15 FCC Rcd at 11278-79, ¶ 5.

If a state does choose to participate in the federal scheme, its determinations are subject to review in federal district court. Section 252(e)(6), entitled "Review of State commission actions," states: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [§§ 251 and 252]." Federal district court is the exclusive forum for such review: the Act provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." *Id.* § 252(e)(4).

Regardless of whether a state chooses to participate in administering these requirements of federal law, the Act expressly preserves existing *state* laws regulating local telephone service, so long as those laws are consistent with federal law. *Id.* §§ 251(d)(3), 252(e)(3), 261(b). States therefore retain their traditional regulatory role with respect to matters not addressed by the 1996 Act.

2. The Dispute in this Case

The underlying dispute in this case concerns a ruling by the Maryland Public Service Commission ("PSC") requiring petitioner Verizon Maryland Inc. to pay, purportedly under the terms of its interconnection agreements with several competing carriers, "reciprocal compensation" for Internet-bound calls originated on Verizon's network.

The issue derives from the terms of the 1996 Act, which imposes on all local exchange carriers "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Under "reciprocal compensation," when a customer of Carrier A places a call to a

customer of Carrier B in the same local area, Carrier A pays Carrier B for terminating that local call. Likewise, when a customer of Carrier B calls a customer of Carrier A, Carrier B pays Carrier A for terminating the call.

The FCC has ruled that the reciprocal-compensation obligation applies only to "local telecommunications traffic" (47 C.F.R. § 51.703(a)), defined as traffic that "originates and terminates within a local service area" (*id.* § 51.701(b)(1)). For non-local or "interexchange" calls, a different set of rules applies (those governing long-distance "access charges"). *See Local Competition Order*,[5] 11 FCC Rcd at 16013, ¶ 1034.

The question whether reciprocal compensation applies to Internet-bound calls — that is, whether Internet-bound calls are local or non-local in nature — has given rise to numerous disputes throughout the country. A customer typically initiates an Internet session by using a modem to connect initially to the facilities of an Internet service provider, or "ISP," such as America Online. The customer's computer then transmits the address of a requested website, which may be located anywhere in the world, and the ISP then completes the communication link by connecting the customer to the website.

Because Internet calls entail "a continuous transmission from the end user to a distant Internet site," and because "a substantial portion of Internet traffic involves accessing interstate or foreign websites," the FCC ruled in 1999 that "ISP-bound traffic is non-local interstate traffic" for which reciprocal compensation is

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[5] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996), *modified on recon.*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

not required under § 251(b)(5) and the FCC's implementing regulations.[6]

Prior to that ruling, the Maryland PSC had determined that Internet-bound calls do qualify as local traffic under the terms of Verizon's interconnection agreements, even though those agreements, while not specifically addressing the application of reciprocal compensation to Internet-bound calls, precisely track the language of § 251(b)(5) and the FCC's regulations. The PSC made clear, however, that its determinations were subject to revision based on subsequent FCC rulings bearing on the subject.

After the FCC ruled that Internet-bound calls do not qualify as local for purposes of reciprocal compensation under § 251(b)(5), Verizon asked the PSC to revise its prior determinations and hold that Verizon did not owe reciprocal compensation for Internet calls under the terms of its interconnection agreement with MFS Intelenet of Maryland, Inc. A sharply divided PSC denied that request by a vote of 3-2. *See* Pet. App. 91a-111a. It directed Verizon to continue paying reciprocal compensation for such calls not only to MFS Intelenet, but also to all other carriers that had adopted the relevant terms of that agreement. *See id.* at 107a.[7]

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[6] Declaratory Ruling, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 14 FCC Rcd 3689, 3699, 3702, 3706, ¶¶ 13, 18, 26 n.87 (1999), *vacated and remanded for further consideration, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000), *proceedings on remand pending.*

[7] The other carriers were American Communications Services of Maryland, Inc., RCN Telecom Services of Maryland Inc., Starpower Communications, LLC, TCG-Maryland, and MCImetro Access Transmission Services LLC. Both MFS Intelenet and MCImetro Access are wholly owned subsidiaries of WorldCom, Inc. TCG-Maryland is a wholly owned subsidiary of AT&T Corp.

3. Proceedings Below

a. District Court. Verizon sought review of the PSC's decision in the United States District Court for the District of Maryland, citing as the basis for jurisdiction 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331. The complaint named as defendants the Maryland PSC, the members of the Maryland PSC in their official capacity, MFS Intelenet, and the five other affected carriers.

On the PSC's motion, the district court dismissed the complaint on the ground that the Eleventh Amendment precluded its exercise of subject matter jurisdiction under either § 252(e)(6) or § 1331. Pet. App. 73a-90a. The court's decision had three elements: (i) In the wake of *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the PSC's voluntary exercise of federal authority under the 1996 Act cannot be treated as a constructive waiver of its Eleventh Amendment immunity to suit in federal court. Pet. App. 77a-79a. (ii) The decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), forecloses reliance on the *Ex parte Young* doctrine in this case. Pet. App. 79a-83a. (iii) The PSC was an indispensable party to the case, so dismissal of the case against the PSC and the commissioners required dismissal of the entire complaint. *Id.* at 84a-85a.

b. Court of Appeals. A divided panel of the Fourth Circuit affirmed. Pet. App. 1a-72a.

The majority began by rejecting Verizon's waiver argument. "Even assuming Congress conferred a gift on State utility commissions by allowing them to participate in the regulation of telecommunications — a gift that is difficult to discern — the language of § 252(e)(6) simply falls short" as a clear statement that such participation is conditioned on a waiver of sovereign immunity from suit in federal court. Pet. App.

19a-20a (footnote omitted). In the court's view, § 252(e)(6) "provides for federal court review of State commission *determinations*, but it does not provide that the State commission thereby agrees to be named as a party in federal court or that it waives its Eleventh Amendment immunity." *Id.* at 15a. The majority recognized that its holding on this point conflicted with decisions of the Fifth, Seventh, and Tenth Circuits.[8]

The court next held that the *Ex parte Young* doctrine does not permit this action to proceed against the individual members of the PSC in their official capacity to restrain ongoing violations of federal law. Relying on this Court's decision in *Seminole Tribe*, the majority stated: "If . . . we were to permit an *Ex parte Young* action to proceed against State officers, presumably to answer to a federal court injunction and potentially to face sanctions for non-compliance with that injunction, we would be supplementing the narrowly defined federal court review selected by Congress." Pet. App. 28a-29a. The court acknowledged that its holding on this point conflicted with decisions of the Fifth, Sixth, Seventh, and Tenth Circuits.[9]

Having ruled that neither the PSC nor its members could lawfully be made parties to the federal court action, the majority held next that the district court lacked jurisdiction under § 252(e)(6) to allow the action to proceed against the private defendants. In its view,

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[8] *See* Pet. App. 20a (citing *AT&T Communications v. BellSouth Telecomms., Inc.*, 238 F.3d 636, 646-47 (5th Cir. 2001); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 342-44 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 896 (2001); *MCI Telecomms. Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 938-39 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001)).

[9] *See* Pet. App. 30a (citing *AT&T Communications*, 238 F.3d at 647-49; *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.), *cert. denied*, 121 S. Ct. 54 (2000); *MCI Telecomms.*, 222 F.3d at 345; *MCI Telecomms.*, 216 F.3d at 939-40).

"State commission orders administering and enforcing interconnection agreements" — in contrast to orders approving or rejecting such agreements — "are not § 252 determinations." Pet. App. 47a. Rather, they are determinations made "within [the state commissions'] retained powers [under both federal and state law], and accordingly they are reviewable only by State courts in accordance with State law that the 1996 Act has preserved." *Id.*[10] The majority acknowledged that its decision on this point conflicted with decisions of the Fifth, Seventh, Eighth, and Tenth Circuits.[11]

Finally, the court held that "28 U.S.C. § 1331 does not provide federal jurisdiction over [Verizon's] claims" because, in its judgment, "Congress intended that federal jurisdiction be limited to the grant in 47 U.S.C. § 252(e)(6)." Pet. App. 50a. The court predicated its holding, in part, on its view that the *Rooker-Feldman* doctrine[12] — under which "lower federal courts are not authorized to review final judgments from State court proceedings" (*id.* at 50a n.8) — should be extended to prohibit, "in the absence of specific federal authorization," federal court review of orders issued by "a

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[10] According to the court of appeals, the Maryland PSC's authority to interpret and enforce 1996 Act agreements derives not from the 1996 Act itself but from "the [Communications Act of 1934] and Maryland law." *See* Pet. App. 41a (citing 47 U.S.C. § 152(b) and Md. Code Ann., Pub. Util. Cos. § 2-113 (1998)).

[11] *See* Pet. App. 44a-45a (citing *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 481 (5th Cir. 2000); *Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999), *cert. granted sub nom. Mathias v. WorldCom Techs., Inc.*, No. 00-878 (Mar. 5, 2001); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 497-98 (10th Cir. 2000)).

[12] The *Rooker-Feldman* doctrine refers to *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

State quasi-judicial body, such as the Maryland Public Service Commission." *Id.* at 50a. The court acknowledged that its ruling on § 1331 conflicted with the Sixth Circuit's decision in *GTE North, Inc. v. Strand*, 209 F.3d at 919. Pet. App. 50a.

Judge King dissented. Concerned that the majority had "isolate[d] itself . . . from every other court of appeals that has decided these issues" (*id.* at 52a), and "find[ing] these [other] decisions highly persuasive in addressing the jurisdictional and immunity issues" (*id.* at 53a-54a), Judge King concluded (i) that "§ 252(e)(6) expressly confers jurisdiction on the federal courts to review the states' enforcement determinations" (*id.* at 56a); (ii) that "a state waives the defense of sovereign immunity by electing to participate in the regulation of interconnection agreements" (*id.* at 59a); and (iii) that "[e]ven if Maryland had not waived its Eleventh Amendment immunity, the individual members of the Commission still may be sued in their individual capacities, pursuant to *Ex parte Young*, for prospective injunctive relief" (*id.* at 67a). Because Judge King believed that "jurisdiction is provided in the district courts by § 252(e)(6)," he found it "unnecessary . . . to reach the argument that 28 U.S.C. § 1331 confers general federal question jurisdiction." *Id.* at 58a n.5. He added, however, that, "contrary to the assertion of the majority, . . . the *Rooker-Feldman* doctrine has no application here." *Id.* (citation omitted).

REASONS FOR GRANTING THE PETITION

A. The Court Should Grant Certiorari To Ensure Timely Resolution of the Jurisdictional and Constitutional Issues on Which the Circuits Are Divided

This case presents squarely and without complication each of the three questions on which this Court granted certiorari in *Mathias*. If that were all, this would be an

obvious hold. But because this case also presents an independently important § 1331 issue that *Mathias* does not present, granting this petition and setting it for argument in tandem with *Mathias* would allow the Court to resolve next Term the full set of jurisdictional questions that currently divide the circuits. The Court would then have before it both possible sources of federal court jurisdiction — § 252(e)(6) and § 1331. That way, if the Court were to conclude that jurisdiction does not lie under § 252(e)(6) but does lie under § 1331, it would still have reason to reach the Eleventh Amendment questions on which the Fourth Circuit stands in stark disagreement with its sister circuits.

As we explained above, time is of the essence in the context of this statute. Because each of 50 state commissions has authority to interpret and enforce scores of individual interconnection agreements, and because their rulings have immediate and significant economic consequences for those affected, the parties have an urgent need for definitive guidance concerning their right to federal court review. If the Court were to leave the § 1331 issue off the table until a decision in *Mathias*, and if it were to hold that § 252(e)(6) does not apply to interpretation and enforcement actions, the resulting delay in resolving the existing circuit splits on § 1331 and on each of the two Eleventh Amendment issues would unduly prolong the current state of confusion.

To protect against that risk, the Court should grant certiorari in this case on at least the § 1331 question and both of the Eleventh Amendment questions and should set the case for argument in tandem with *Mathias*. Granting certiorari on only the § 1331 question would not accomplish the same objective. If the Court were to hold in *Mathias* that § 252(e)(6) does not provide subject matter jurisdiction, it would presumably dispose of the case on that basis without reaching

the Eleventh Amendment questions. *See, e.g., Texas v. Cobb*, No. 99-1702, slip op. at 4 (Apr. 2, 2001) ("Because we answer the first question in the negative, we do not reach the second."). If the Court were then to determine in this case that § 1331 *does* provide subject matter jurisdiction, it would still be unable to reach the Eleventh Amendment issues unless it has granted certiorari on those questions as well.

B. The Fourth Circuit Is in Conflict with the Sixth Circuit on the Question of § 1331 Jurisdiction

The court of appeals ruled that, where § 252(e)(6) does not apply, § 1331 gives a district court no independent subject matter jurisdiction to adjudicate a claim that a state commission's actions violate the 1996 Act. As the court itself recognized (Pet. App. 50a), that ruling put the Fourth Circuit in direct conflict with the Sixth Circuit, which had earlier held just the opposite in *GTE North, Inc. v. Strand*, 209 F.3d 909.

At issue in *GTE North* was a suit against members of the Michigan Public Service Commission challenging a PSC order as unlawful under the 1996 Act. The order — entered in a purportedly state-law proceeding unrelated to a specific interconnection agreement — directed GTE (a) to publish tariffs offering elements of its telephone network at PSC-prescribed rates, and (b) to allow competitors to purchase pre-assembled service platforms. *See* 209 F.3d at 914. The district court dismissed the complaint for lack of jurisdiction, reasoning that GTE's suit "was premature because the [Michigan PSC] had yet to issue a final order reviewable under § 252(e)(6)." *Id.* at 916.

The Sixth Circuit reversed. It held that "federal review is available under § 1331 to determine whether state commission orders violate federal law except in

cases in which the challenged regulatory action is clearly an interlocutory order arising out of § 252 proceedings." *Id.* at 919. The Michigan PSC argued, much as the Maryland PSC argued in this case, that "'there is neither a need nor a requirement for the federal District Court to review [the PSC's order]' because that order is fully reviewable in Michigan state court." *Id.* at 922. In the Sixth Circuit's view, however, that argument, though it "may be relevant to the question whether the district court should abstain from deciding GTE's claims," was "wholly irrelevant" to whether the federal district court had federal-question jurisdiction to hear GTE's claims. *Id.* at 922-23.

In contrast to the Sixth Circuit, the Fourth Circuit held that "Congress created a limited federal right of review of State commission determinations as defined in 47 U.S.C. § 252(e)(6), and otherwise it intended for the right of review to be exercised in State courts." Pet. App. 49a. The court further held that "it would violate basic tenets of federalism to conclude, in the absence of specific federal authorization, that a federal court may review a State quasi-judicial body, such as the Maryland Public Service Commission." *Id.* at 50a.

The conflict is stark. The rule in the Sixth Circuit is that, in the absence of a specific *limitation* in the 1996 Act, § 1331 provides general federal-question jurisdiction to review claims alleging that a state commission's order violates the 1996 Act. The rule in the Fourth Circuit is that, in the absence of a specific *authorization* in the 1996 Act, § 1331 does *not* provide general federal-question jurisdiction to review claims alleging that a state commission's order violates the 1996 Act. As a result, for cases in which § 252(e)(6) review is not available for reasons other than the interlocutory nature of the state commission's order, parties in the Sixth Circuit retain a federal forum for pursuit of their

claims, but parties in the Fourth Circuit must pursue their claims, if at all, solely in state courts.

It is important for this Court to resolve the split expeditiously to minimize the adverse effect of this unwarranted disparity in the administration of a federal telecommunications statute that has far-reaching consequences for consumers and for the nation's economy.

C. The Fourth Circuit Reached the Wrong Conclusion on § 1331 Jurisdiction

Even if the Fourth Circuit were correct in holding that the jurisdiction conferred by § 252(e)(6) is limited to review of a state commission's initial approval or rejection of an interconnection agreement, the court was wrong to hold that § 1331 provides a federal district court with no independent subject matter jurisdiction to determine whether a state commission's action interpreting or enforcing a previously approved 1996 Act interconnection agreement violates federal law.

1. As this Court's precedents make clear, a civil action "arises under" federal law for purposes of § 1331 when a "right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936); *accord City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163-64 (1997).

That test is satisfied here. In the 1996 Act, Congress granted incumbent carriers the statutory right to "negotiate and enter into *a binding agreement* with the requesting telecommunications carrier or carriers," and to do so, moreover, "without regard to the standards set forth in [§ 251(b) and (c)]." 47 U.S.C. § 252(a) (emphasis added). Federal law thus gives Verizon the right to insist that it be held only to the terms of the intercon-

nection agreement to which it actually agreed. Any departure from those terms would violate § 252(a) by negating the agreement's "binding" effect. For example, if a state commission, in furtherance of a state policy favoring reciprocal compensation for Internet-bound traffic, were to disregard an agreement's terms restricting reciprocal compensation to local traffic, a federal district court would have jurisdiction under § 1331 to require adherence to the terms of the agreement under § 252(a).

That is essentially what happened in this case. Verizon's complaint alleged that the Maryland PSC, while purporting to interpret a previously approved interconnection agreement, effectively negated the agreement's terms, which limited reciprocal compensation to "Local Traffic," by incorrectly imputing to the parties an unexpressed intention to extend reciprocal compensation also to Internet-bound traffic. Verizon further alleged that the PSC had predicated its ruling on a mistaken understanding of the governing principles of federal law. *See* Complaint ¶¶ 1-5, 37, 40 (C.A. App. 117-18, 126, 127). Because Verizon's claim arose under federal law, the district court had subject matter jurisdiction under § 1331.

2. Even if Congress had not made the federal right at issue here so plain in § 252(a), three related lines of this Court's precedents teach that a claim such as this one would in any event fall within the federal courts' jurisdiction.

a. Contrary to the court of appeals' apparent understanding, interconnection agreements are not ordinary state-law contracts, but rather "federal contract[s]," the interpretation or enforcement of which, under this Court's precedents, raises questions of federal law subject to federal court jurisdiction under § 1331. *International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963).

Unlike ordinary commercial contracts, which reflect voluntary undertakings by willing parties acting without legal compulsion, 1996 Act interconnection agreements are the product of federal legal coercion designed to implement federal obligations. Incumbent local exchange carriers such as Verizon are required by federal law to negotiate these agreements to discharge their obligations under the 1996 Act — specifically, "to fulfill the duties described in [§ 251(b) and (c)]." 47 U.S.C. § 251(c)(1). Federal law, moreover, requires incumbents to enter into good-faith negotiations at the behest of a requesting carrier even if they would otherwise be unwilling to do so — indeed, even if state law would otherwise *prohibit* such inter-carrier negotiations and agreements. *See id.* § 261(c).

Moreover, federal law enumerates the specific duties that are subject to negotiation, establishes the minimum terms to which an incumbent must "agree" on request, and subjects the resulting "agreements" to governmental approval under specified federal standards, without which the agreement has no effect. *See id.* §§ 251(b)-(c), 252(e). Federal law further requires that these agreements be publicly filed, and it provides that the incumbent carrier must make the provisions of any approved interconnection agreement available to any other requesting carrier on the same terms and conditions. *See id.* § 252(h), (i). Finally, once such an agreement is approved, the incumbent has a federal-law duty to provide service "in accordance with" the agreement's terms. *See id.* § 251(c)(2)(D).

The circumstances here, therefore, are analogous to those in *Machinists*, which involved a suit to enforce an arbitration award issued under the terms of a labor contract implementing requirements of the Railway Labor Act. Holding that the action arose under federal law for purposes of § 1331, the Court stated, in terms that could just as well apply to this case, that the

contracts at issue — "creations of federal law and bound to the statute and its policy" — were necessarily "governed and enforceable by federal law, in the federal courts." 372 U.S. at 692.[13] Other cases are to the same effect. *See, e.g., Norfolk & Western Ry. v. Nemitz*, 404 U.S. 37 (1971) (concluding that a dispute arising out of an agreement implementing obligations under the Interstate Commerce Act raised a federal question); *American Surety Co. v. Schultz*, 237 U.S. 159 (1915) (holding that suit to enforce an appeal bond given to satisfy requirements of federal law raised a federal question).

Just as the issues arising out of an arbitrator's award under a Railway Labor Act contract raised federal questions for purposes of § 1331, so too the issues arising out of a state commission's interpretation or enforcement of a 1996 Act agreement necessarily raise federal questions within the scope of a district court's jurisdiction under § 1331.

Although the Fourth Circuit sought support for its contrary view in this Court's decision in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), that case actually cuts in the opposite direction. The Court there stated that § 1331 provides jurisdiction when a plaintiff "sue[s] to vindicate contractual rights set forth by federal statutes"; that is so, moreover, even where "the relevant statutes lack[] express provisions creating federal causes of action." *Id.* at 22. The decisive question is whether Congress intended the contracts at issue to be "'creations of federal law'" and "the rights

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[13] The Court explained, again in terms that equally fit this case, that, "[i]f any provision contained in [such a] contract is enforceable, it is because of congressional sanction: '[T]he federal statute is the source of the power and authority . . . though it takes a private agreement to invoke the federal sanction.'" 372 U.S. at 692 (quoting *Railway Employes' Dep't v. Hanson*, 351 U.S. 225, 232 (1956)).

and duties contained in those contracts [to] be federal in nature." *Id.* at 23 (quoting *Machinists*, 372 U.S. at 692).

The circumstances here amply satisfy that standard. Congress, among other things, required incumbent carriers to negotiate interconnection agreements to fulfill federal-law duties, established the standards under which the agreements were to be approved or rejected, specified that the agreements would be "binding" as a matter of federal law regardless of any contrary state-law policy, and created a federal-law obligation to act "in accordance with" the terms of those agreements. The resulting agreements are therefore quintessentially creations of federal law intended to implement federal rights and duties.

In *Jackson Transit*, the Court determined, based on explicit legislative history, that Congress intended the suits at issue to proceed in state court and thus that the plaintiff had failed to state a claim. *See* 457 U.S. at 21 n.6, 24-28. Contrary to the Fourth Circuit's view, however, that is not the case here. Nothing in the text or legislative history of the 1996 Act supports the proposition that, insofar as § 252(e)(6) does not apply, Congress "intended for the right of review to be exercised in State courts." Pet. App. 49a.

b. A related principle likewise supports § 1331 jurisdiction in this case. Because federal law mandates the existence of interconnection agreements, requires a carrier to provide service according to their terms, directs that they be published, and specifies that service must be made available on the same terms to all parties, these 1996 Act agreements are substantively indistinguishable from federal tariffs. And, as this Court has held repeatedly, a claim involving enforcement of a federal tariff necessarily arises under federal law and presents questions reviewable in federal court. *See Thurston Motor Lines, Inc. v. Jordan*

K. Rand, Ltd., 460 U.S. 533, 534 (1983) (per curiam); *Louisville & N.R.R. v. Rice*, 247 U.S. 201, 202 (1918).

The Court in *Thurston Motor Lines* ruled that even a simple collection action under a federal tariff raised federal questions. Because the "'dut[ies] and obligation[s]'" under such a tariff "'grow out of and depend upon'" the Interstate Commerce Act, which required the carrier to file such tariffs and to collect all lawful charges prescribed by the tariff, an action to enforce the tariff is within the subject matter jurisdiction of the federal courts. 460 U.S. at 534 (quoting *Rice*, 247 U.S. at 202); *see Great Northern Ry. v. Merchants' Elevator Co.*, 259 U.S. 285, 290 (1922) (Brandeis, J.) ("Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law."). The same principle applies to a claim that a state commission's interpretation or enforcement of an interconnection agreement violates federal law.

An incumbent carrier's "duties and obligations" under a 1996 Act interconnection agreement likewise arise from federal law, and that is true even if, as here, the particular terms at issue were the result of "voluntary" negotiation rather than arbitration. Indeed, such negotiations necessarily occur against the backdrop of statutory and regulatory requirements that dictate the minimum terms to which an incumbent carrier will be held in the absence of a negotiated agreement. As the Fourth Circuit itself explained in a prior 1996 Act case, because many of the disputes between two parties "will have been previously resolved by . . . FCC Rules and interpretations," "many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act." *AT&T*

Communications of Southern States, Inc. v. BellSouth Telecomms., Inc., 229 F.3d 457, 465 (4th Cir. 2000).[14]

c. Yet another line of this Court's cases stands for the proposition that federal court review is presumptively available when an agency wielding federal power adjudicates the rights of private parties, even if no statute expressly authorizes such review. Thus, in *Stark v. Wickard*, 321 U.S. 288 (1944), milk producers sought a federal court injunction against the enforcement of a Department of Agriculture order setting the minimum price for milk. The Court held that "the silence of Congress as to judicial review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." *Id.* at 309. In the absence of a specific jurisdictional grant, courts are presumed to have "general federal-question jurisdiction under 28 U.S.C. § 1331" to hear such claims. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 494 (1991); *see also Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 56 (1993).

Indeed, so long as a party raises federal-law questions, a district court has subject matter jurisdiction even if the plaintiff's cause of action is based on a state-law agency-review provision. *See City of Chicago*, 522 U.S. at 163-65; *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983) ("Even though state law creates appellant's causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a

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[14] It is well recognized, of course, that tariffs can be based on negotiated agreements. *See, e.g., Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (applying the filed-rate doctrine to a negotiated contract filed with the Federal Energy Regulatory Commission as a tariff); 47 C.F.R. § 61.55 (governing "contract-based tariffs").

substantial question of federal law in dispute between the parties.").

Those precedents apply here. Even assuming that an enforcement decision is not a "determination" for purposes of § 252(e)(6), a state commission's authority to superintend these federally mandated agreements necessarily comes from federal, not state, law. The FCC has squarely held that such determinations involve state commission "responsibilities" under the federal Act and thus that the FCC must step in and resolve the matter if (but only if) a state commission declines to do so. *See Starpower Communications*, 15 FCC Rcd at 11279-80, ¶ 6; *see also* 47 U.S.C. § 252(e)(5). As the Seventh Circuit aptly put it, by resolving these disputes, a state commission acts as a "deputized" federal regulator and "regulat[es] on behalf of Congress" when it enforces a 1996 Act interconnection agreement. *MCI Telecomms.*, 222 F.3d at 343, 344. Even the Fourth Circuit acknowledged that a state commission's "explicit authority" to act rests in part on the Communications Act. *See* Pet. App. 41a.

3. The Fourth Circuit's holding — that a federal district court lacks § 1331 jurisdiction to determine whether a state commission's interpretation or enforcement of an interconnection agreement violates the 1996 Act — not only collides with this Court's precedents, but also produces an anomalous scheme that Congress could not have contemplated. Under the Fourth Circuit's approach, the availability of federal district court review would depend entirely on whether a dispute happens to arise early enough to be decided in an arbitration. If it does, the aggrieved party has access to the federal courts under § 252(e)(6); if precisely the same dispute surfaces only after an agreement has been approved, the aggrieved party has no access to the federal courts, even under § 1331.

This case provides a good example of the problem. As noted, the core issue here is whether reciprocal compensation is required for Internet-bound calls. If that issue had arisen during negotiations, the parties would have requested arbitration, and the Maryland PSC would have been bound to apply federal law in resolving the dispute. *See* 47 U.S.C. § 252(c). But in fact the issue was latent at the arbitration stage. The parties adopted a provision that simply tracks the statute and the FCC's reciprocal-compensation rule without addressing the specific question of Internet-bound traffic.[15]

Because the agreement's provisions mirror federal law, the substantive question here is no different from the question that would have been raised had the dispute arisen during negotiations — whether the 1996 Act and the FCC's implementing regulation require reciprocal compensation for Internet-bound traffic. But, under the Fourth Circuit's approach, that issue would now be transformed into one that raises no federal question for purposes of § 1331. The conclusion that the same legal issue is within the jurisdiction of the federal courts when raised at one time but not when raised at another time is not only "surpassing strange" (*AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366,

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[15] In particular, the relevant provision of Verizon's agreement with MFS (entitled "Reciprocal Compensation Arrangements – Section 251(b)(5)") provides, in terms essentially identical to those in the FCC's regulation, that the parties "shall compensate each other for transport and termination of Local Traffic"; it defines "Local Traffic," again in terms that track the FCC's regulation, as "traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area." Agreement §§ 1.44, 5.7.2 (C.A. App. 53, 58); *see* 47 C.F.R. § 51.701(a), (b)(1). To underscore the parties' intention to adhere closely to what the statute itself requires, the agreement further states that "'Reciprocal Compensation' is As Described in the [1996] Act." Agreement § 1.61 (C.A. App. 55).

378 n.6 (1999)); it is also directly contrary to the Court's conclusion that, under the 1996 Act, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel" (*id.*).

Finally, nothing in this Court's precedents supports the Fourth Circuit's unwarranted extension of the *Rooker-Feldman* doctrine to the circumstances of this case. As this Court has explained, the *Rooker-Feldman* doctrine "interprets 28 U.S.C. § 1257 as ordinarily barring direct review in the lower federal courts of a decision reached by the highest state court, for such authority is vested solely in this Court." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 622 (1989). That limited statutory construction has no application here. When a state agency, acting as a voluntary federal regulator, determines the rights and obligations of parties to an agreement that is itself a creation of federal law, the *Rooker-Feldman* doctrine's interpretation of 28 U.S.C. § 1257 cannot sensibly be extended to foreclose a district court's exercise of general federal-question jurisdiction under § 1331 to determine whether the state agency's decision violates federal law.

Indeed, the Fourth Circuit's novel view that "basic tenets of federalism" justify applying the *Rooker-Feldman* doctrine to bar review of a state administrative agency's decision (Pet. App. 50a) is contrary to the views of the four other circuits that have addressed the question, each of which determined that the doctrine does not apply to decisions of such agencies. *See Van Harken v. City of Chicago*, 103 F.3d 1346, 1348-49 (7th Cir. 1997) (Posner, J.); *Narey v. Dean*, 32 F.3d 1521, 1525-26 (11th Cir. 1994); *Scott v. Flowers*, 910 F.2d 201, 208 (5th Cir. 1990); *Ivy Club v. Edwards*, 943 F.2d 270, 284 (3d Cir. 1991).

CONCLUSION

The petition for a writ of certiorari should be granted, at least as to questions 2, 3, and 4, and the case should be set for oral argument in tandem with *Mathias v. WorldCom Techs., Inc.*, No. 00-878. Alternatively, the petition should, at a minimum, be held pending the decision in *Mathias* and then disposed of as appropriate in light of that decision.

Respectfully submitted,

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April 5, 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-2459

BELL ATLANTIC MARYLAND, INCORPORATED,
Plaintiff-Appellant,

v.

MCI WORLDCOM, INCORPORATED; AMERICAN COMMUNICATIONS SERVICES OF MARYLAND, INCORPORATED; RCN TELECOM SERVICES OF MARYLAND, INCORPORATED; STARPOWER COMMUNICATIONS, LLC; TCG-MARYLAND; MCIMETRO ACCESS TRANSMISSION SERVICES, INCORPORATED; THE PUBLIC SERVICE COMMISSION OF MARYLAND; GLENN F. IVEY, in his official capacity as Chairman of the Public Service Commission of Maryland; CLAUDE M. LIGON, in his official capacity as Commissioner of the Public Service Commission of Maryland; E. MASON HENDRICKSON, in his official capacity as Commissioner of the Public Service Commission of Maryland; SUSAN BROGAN, in her official capacity as Commissioner of the Public Service Commission of Maryland; CATHERINE I. RILEY, in her official capacity as Commissioner of the Public Service Commission of Maryland,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Intervenor/
Defendant-Appellee,

MARYLAND OFFICE OF PEOPLE'S COUNSEL,
Defendant.

No. 99-2616

BELL ATLANTIC MARYLAND, INCORPORATED,
Plaintiff,

and

UNITED STATES OF AMERICA,
Intervenor/
Defendant-Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF MARYLAND; GLENN F. IVEY, in his official capacity as Chairman of the Public Service Commission of Maryland; CLAUDE M. LIGON, in his official capacity as Commissioner of the Public Service Commission of Maryland; E. MASON HENDRICKSON, in his official capacity as Commissioner of the Public Service Commission of Maryland; SUSAN BROGAN, in her official capacity as Commissioner of the Public Service Commission of Maryland; CATHERINE I. RILEY, in her official capacity as Commissioner of the Public Service Commission of Maryland,
Defendants-Appellees,

and

AMERICAN COMMUNICATIONS SERVICES OF MARYLAND, INCORPORATED; RCN TELECOM SERVICES OF MARYLAND, INCORPORATED; STARPOWER COMMUNICATIONS, LLC; TCG-MARYLAND; MCIMETRO ACCESS TRANSMISSION SERVICES, INCORPORATED; MARYLAND OFFICE OF PEOPLE'S COUNSEL; MCI WORLDCOM, INCORPORATED,
Defendants.

On Appeals from the United States District Court for the District of Maryland, at Baltimore
Frederic N. Smalkin, District Judge
(CA-99-2061-S)

Argued May 1, 2000
Decided Feb. 14, 2001

Before WIDENER, NIEMEYER, and KING, Circuit Judges.

OPINION

NIEMEYER, Circuit Judge:

Seeking review of a decision made by the Maryland Public Service Commission on reciprocal-compensation rights under telecommunications interconnection agreements within its jurisdiction, Bell Atlantic Maryland, Inc. ("Bell Atlantic") filed this action in federal court against the commission, its individual members in their official capacity, and the parties to the interconnection agreements. Bell Atlantic relied on the Telecommunications Act of 1996 as authority for naming the Public Service Commission and its members as defendants and for filing in federal court.

The district court dismissed the action against the State parties under the Eleventh Amendment. Then, concluding that these State parties were indispensable parties under Federal Rule of Civil Procedure 19, it dismissed the action against the private parties on jurisdictional grounds.

While we agree with much of the reasoning in the district court's opinion, we adopt a different rationale on the jurisdictional issues and affirm.

I. Background

Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151-614) (sometimes the "1996 Act")

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Widener joined. Judge King wrote a dissenting opinion.

with the purpose of reducing regulation in the telecommunications industry and promoting competition. As part of that effort, the 1996 Act enables local exchange carriers ("LECs") to use each other's local exchange networks by requiring them to enter into interconnection agreements or be subject to arbitration to impose interconnection agreements. In particular, the 1996 Act requires, among other things, that each LEC, through such an interconnection agreement, "afford access" to its facilities and local network exchange to "any requesting telecommunications carrier," "provide interconnection" to that network, and "establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(4), (b)(5), (c)(2). Through such reciprocal compensation arrangements, LECs compensate each other for intercarrier calls. Thus, if a subscriber of carrier A calls a subscriber of carrier B, then carrier A must share with carrier B some of the revenues collected from the calling-subscriber to compensate carrier B for use of its facilities. Under regulatory authority conferred by the 1996 Act, the Federal Communications Commission ("FCC") has construed the scope of the reciprocal compensation obligation to apply to the "transport and termination of *local* telecommunications traffic." 47 C.F.R. § 51.701(a) (emphasis added). The interconnection agreements, whether reached through voluntary negotiation or through arbitration, are subject to review by State public service commissions and thereafter, in circumstances specified by the 1996 Act, by federal courts and in other circumstances, by State courts.

Bell Atlantic, the incumbent LEC in Maryland, entered into an interconnection agreement with a competing LEC, MFS Intelnet of Maryland, Inc., later succeeded by MCI WorldCom, Inc. ("MCI"), and the Maryland Public Service Commission approved that agreement in October 1996. Shortly thereafter, the parties found themselves in a dispute over whether Bell

Atlantic had to pay reciprocal compensation for its subscribers' telephone calls made to Internet Service Providers ("ISPs") that have local telephone numbers but provide access to interstate destinations through the Internet. Bell Atlantic maintained that ISP-bound telephone calls are not "local traffic" and therefore do not trigger reciprocal compensation obligations either under the 1996 Act or under the parties' interconnection agreement. MCI, on the other hand, took the position that ISP-bound calls are local traffic subject to reciprocal compensation because the calls to the ISP numbers are local. The parties agree that this issue involves substantial sums of money.

To resolve the dispute, MCI filed a complaint against Bell Atlantic before the Maryland Public Service Commission, alleging that Bell Atlantic was in breach of its interconnection agreement with MCI and requesting relief in the form of a cease-and-desist order. The Public Service Commission issued an order on August 13, 1997, finding in favor of MCI and directing Bell Atlantic "to timely forward all future interconnection payments owed [MCI] for telephone calls placed to an ISP" and to pay MCI any reciprocal compensation that it had withheld pending resolution of the dispute. The Public Service Commission based its decision on the terms of the parties' interconnection agreement. It noted, however, that the issue of whether ISP-bound calls are properly characterized as local traffic was pending before the FCC and invited the parties to return "[i]n the event that the FCC issues a decision that requires revision to the directives announced herein." Bell Atlantic appealed the Public Service Commission's order to the Circuit Court for Montgomery County, Maryland, and that court upheld the Public Service Commission decision. *See Bell Atlantic-Maryland, Inc. v. Maryland PSC*, Civil Action No. 178260, Docket Entry # 36, March 26, 1998. Bell Atlantic took no further appeal to higher Maryland courts.

Almost a year later, on February 26, 1999, the FCC issued a ruling (since vacated by the United States Court of Appeals for the D.C. Circuit) that declared ISP-bound traffic to be non-local. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP Bound Traffic*, 14 FCC Rcd 3689, 3690 (¶ 1) (1999) ("FCC Ruling"), *vacated, Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). Relying on this declaratory ruling, Bell Atlantic submitted a petition to the Maryland Public Service Commission seeking a declaration that it did not, after all, owe MCI reciprocal compensation for ISP-bound traffic under the parties' interconnection agreement. In a 3-2 decision, the Maryland Public Service Commission denied Bell Atlantic's petition on June 11, 1999. The Public Service Commission recognized that the FCC's ruling had determined that ISP-bound traffic generally was interstate traffic, but it noted that the FCC also indicated that parties to interconnection agreements "may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic" (quoting FCC Ruling, 14 FCC Rcd at 3703-04 (¶ 24)). Indeed, the FCC also concluded that "[w]here parties have agreed to include this traffic within their . . . interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions." FCC Ruling, 14 FCC Rcd at 3703 (¶ 22). With this understanding of the FCC's order, the Maryland Public Service Commission found, as a matter of contract interpretation, that MCI and Bell Atlantic had agreed to treat ISP-bound traffic as local traffic subject to reciprocal compensation. In addition, the Public Service Commission stated that, in the absence of a voluntarily negotiated agreement between LECs with respect to the treatment of ISP-bound calls, the Public Service Commission would treat such ISP-bound traffic as local and thus subject to reciprocal compensation

"[u]ntil such time as a federal inter-carrier compensation mechanism is developed."

Seeking review of the Public Service Commission's decision, Bell Atlantic filed this action in federal court on July 12, 1999, naming as defendants the Maryland Public Service Commission, its individual members in their official capacity, MCI, and other competing LECs. Bell Atlantic's complaint sought a declaratory judgment that the Maryland Public Service Commission had violated the Telecommunications Act of 1996 by failing to apply and by misinterpreting the FCC Ruling. Bell Atlantic also sought an injunction prohibiting enforcement of the Maryland Public Service Commission's determinations and requiring the Public Service Commission to order the competing LECs to refund reciprocal compensation obtained from Bell Atlantic for ISP-bound traffic.

The Maryland Public Service Commission and its individual members filed a motion to dismiss the complaint, asserting the action was barred by the Eleventh Amendment. The Public Service Commission also contended that because it was an indispensable party to any action filed to review its decisions, the federal court could not proceed with the action in the absence of the Public Service Commission as a party.

The United States intervened and joined Bell Atlantic and the other private defendants in opposition to the motion to dismiss. These parties argued that the Maryland Public Service Commission had constructively waived its sovereign immunity with respect to this action by participating in the regulatory scheme established by the 1996 Act. They argued in the alternative that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), would permit the suit to go forward against the individual commission members in their official capacities. In addition, Bell Atlantic and the other private defendants argued that the Public Service Commission in any event was not an indispensable party and that this action therefore could proceed in

the absence of the Public Service Commission as a party.

The district court granted the motion to dismiss, holding (1) that the action against the Public Service Commission and the individual commissioners was barred by the Eleventh Amendment; (2) that the doctrine of *Ex parte Young* did not apply to permit this action against the individual commissioners under the reasoning of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); and (3) that the Maryland Public Service Commission was an indispensable party without which the action could not proceed. This appeal followed.

II. Eleventh Amendment Principles

The Maryland Public Service Commission, as an agency of the State of Maryland, and its individual commissioners in their official capacity (collectively "the State") assert that they are immune from suit in federal court under the doctrine of sovereign immunity as guaranteed in federal court by the Eleventh Amendment. The State asserts that it has not waived its sovereign immunity; that Congress has not sought to exercise its power, under the Fourteenth Amendment, to abrogate the State's sovereign immunity in the Telecommunications Act; and that therefore the Eleventh Amendment is a complete bar to suit against the State in federal court. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

Bell Atlantic and the United States, as an intervenor, contend that the State has implicitly waived its immunity from private suit in federal court by participating in the regulatory scheme created by the Telecommunications Act of 1996. They point out that Congress had no obligation to give States any role in regulating the telecommunications industry. They argue that by giving such a role to the States, Congress conferred upon the States a gift which was conditioned

on their amenability to suit in federal court under 47 U.S.C. § 252(e)(6). They note that the State had a clear choice—given in 47 U.S.C. § 252(e)(5)—either to participate in the regulation of interconnection agreements or to forego such a role and allow the FCC to act in its stead. In any event, Bell Atlantic and the United States argue that Bell Atlantic's suit against the individual State commissioners in their official capacity is permitted under the doctrine of *Ex parte Young*, 209 U.S. 123, because Bell Atlantic is seeking only declaratory and injunctive relief against State officials to prevent an ongoing violation of federal law. They argue that the Maryland Public Service Commission violated federal law in reaching a decision contrary to the FCC's declaratory ruling that ISP-bound traffic is non-local and therefore not subject to reciprocal compensation obligations.

The district court found that the Eleventh Amendment barred Bell Atlantic's action against the State. It noted that the notion of constructive waiver of Eleventh Amendment immunity was recently repudiated by the Supreme Court's decision in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999) (stating that "constructive waiver is little more than abrogation under another name"). In addition, the district court concluded that the State did not waive its Eleventh Amendment immunity as a condition to receipt of a gift from Congress. The court stated, "It is beyond this Court's imagination how Congress' offer to the States to participate as regulators in the very federal scheme that divested them of their local power can be considered a 'gift,' and it is certainly not one that the states could freely decline to accept." The district court also rejected Bell Atlantic's attempt to sue the individual commissioners under *Ex parte Young*. Relying on *Schweiker v. Chilicky*, 487 U.S. 412 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate

remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional . . . remedies"), the district court concluded that Congress explicitly precluded an *Ex parte Young* action against individual commissioners, observing that federal jurisdiction was granted to review determinations made under 47 U.S.C. § 252 by "State commissions," not by individual commissioners. Additionally, the district court noted that an *Ex parte Young* action against the individual State commissioners would expose them to "the full remedial powers of a federal court, including, presumably, contempt sanctions," *Seminole Tribe*, 517 U.S. at 75, not the limited federal review—provided in 47 U.S.C. § 252(e)(6)—of determinations made by State commissions to ensure that interconnection agreements comply with federal requirements. The district court concluded, "In short, this Court cannot recognize an implied cause of action against the Commissioners under *Ex parte Young*, because the Court infers from the 1996 Act that Congress did not authorize such federal jurisdiction." The district court noted that two other district courts had reached the same conclusion. *See Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wis.*, 57 F. Supp. 2d 710 (W.D. Wis. 1999), *rev'd*, *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000); *AT&T Communications v. BellSouth Telecomms., Inc.*, 43 F. Supp. 2d 593 (M.D. La. 1999), *rev'd*, *AT&T Communications v. BellSouth Telecomms., Inc.*, ___ F.3d ___, 2001 WL 38281 (5th Cir. 2001).

In addressing these issues framed by the parties, we must conduct our analysis with respect for the principles of federalism, which guide and shape Eleventh Amendment doctrine and which inform our reluctance to infer any negation of a State's immunity from suit absent (1) a valid abrogation of that immunity by Congress, (2) a State's clear and unequivocal waiver of immunity, or (3) the prosecution of an action that fits comfortably within the doctrine of *Ex parte Young*.

It is by now well established that the States' "residuary and inviolable sovereignty," protected by the Eleventh Amendment, precludes private suits against non-consenting States.[1] *Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting The Federalist No. 39, at 245 (J. Madison) (C. Rossiter ed. 1961)); *see also Seminole Tribe*, 517 U.S. at 54; *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). And the Supreme Court has repeatedly emphasized that a State's sovereign immunity is not strictly limited by the text of the Eleventh Amendment[2] because the Amendment merely confirms State sovereign immunity as a preexisting constitutional principle, which plays a vital role in our constitutional structure. *See Alden*, 527 U.S. at 712-13; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997); *Seminole Tribe*, 517 U.S. at 54; *see also Litman v. George Mason Univ.*, 186 F.3d 544, 549 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000); *Creative Goldsmiths, Inc. v. Maryland*, 119 F.3d 1140, 1144 (4th Cir. 1997). It is a State's sovereign immunity that limits the degree to which the State is subject to the federal power. This principle "accords the States the respect owed them as members of the federation," *Alden*, 527 U.S. at 748-49 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146), and avoids the indignity of States being subjected to the "coercive process of judicial tribunals at the instance of private parties," *Seminole Tribe*, 517 U.S. at 58 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146).

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[1] A State's sovereign immunity does not preclude suits brought in federal court by the federal government, *see United States v. Texas*, 143 U.S. 621, 644-45 (1892), or by a sister State, *see South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904), because inherent in the plan of the Constitutional Convention was the surrender by the States of immunity as to these suits, *see Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991).

[2] The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

While State sovereign immunity is an inherent feature of our federal structure, so too are limitations on that immunity, a consequence of the People's grant of authority to a federal government. Thus, Congress can abrogate the sovereign immunity of nonconsenting States if (1) it validly acts "pursuant to a constitutional provision granting Congress the power to abrogate," and (2) it "unequivocally expresse[s] its intent to abrogate the immunity." *Seminole Tribe*, 517 U.S. at 55. The Supreme Court has recognized that § 5 of the Fourteenth Amendment, designed as it was to "expand[] federal power at the expense of state autonomy," grants Congress a power of abrogation that "intrude[s] upon the province of the Eleventh Amendment." *Seminole Tribe*, 517 U.S. at 59; *see also Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976).

In addition, to ensure the supremacy of federal law, a State's sovereign immunity under the Eleventh Amendment is lifted in certain cases to allow federal jurisdiction over suits that seek prospective injunctive relief against a State officer alleged to be perpetrating an ongoing violation of federal law. *See Ex parte Young*, 209 U.S. 123; *see also Alden*, 527 U.S. at 747; *Seminole Tribe*, 517 U.S. at 73-74; *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Edelman v. Jordan*, 415 U.S. 651, 663-68 (1974); *CSX Transp., Inc. v. Board of Pub. Works*, 138 F.3d 537, 540-41 (4th Cir. 1998), *cert. denied*, 525 U.S. 821 (1998); *Republic of Paraguay v. Allen*, 134 F.3d 622, 627 (4th Cir. 1998). Even though the injunctive relief, if ordered, would undoubtedly affect the State, sovereign immunity does not bar such a suit because a State official who acts contrary to federal law is "stripped of his official or representative character." *Ex parte Young*, 209 U.S. at 160. The Supreme Court has declined, however, to extend this principle to suits seeking retrospective monetary relief, reasoning that "to do so would effectively eliminate the constitutional immunity of the States." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) ("*Pennhurst II*").

Finally, nothing in the federal structure prohibits a State from voluntarily waiving its sovereign immunity from suit by private individuals either by explicitly consenting to such suits, *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53-54 (1944); *Smith v. Reeves*, 178 U.S. 436, 441 (1900), or by accepting from Congress a gift or gratuity that is conditioned on such a waiver, *see College Savings Bank*, 527 U.S. at 686-87; *Atascadero*, 473 U.S. at 247; *Litman*, 186 F.3d at 550. But "[t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero*, 473 U.S. at 241; *see also College Savings Bank*, 527 U.S. at 675; *Edelman*, 415 U.S. at 673; *Litman*, 186 F.3d at 550. Accordingly, a federal court may find a State to have waived its immunity from private suit in federal court only if the State directly and affirmatively waives its Eleventh Amendment immunity in a State constitutional provision or statute that explicitly "specif[ies] the State's intention to subject itself to suit." *Atascadero*, 473 U.S. at 241; *see also Litman*, 186 F.3d at 550; *Booth v. Maryland*, 112 F.3d 139, 145 (4th Cir. 1997). Similarly, a gift or gratuity from Congress, by itself, will effect a waiver of immunity by a recipient State only if Congress "manifest[s] a clear intent" to condition the gift or gratuity on the State's waiver of its constitutional immunity. *Atascadero*, 473 U.S. at 247; *see also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("*Pennhurst I*"); *Litman*, 186 F.3d at 553-55 (holding that Congress clearly, unambiguously, and unequivocally conditioned a State's receipt of Title IX federal education funds on a State's waiver of its Eleventh Amendment immunity in actions brought in federal court under Title IX).

With these relevant principles in hand, we now address the two issues raised by the parties in this case: (1) whether the State of Maryland waived its sovereign immunity by participating in the administration of the Telecommunications Act of 1996, and

(2) whether the doctrine of *Ex parte Young* authorizes Bell Atlantic's suit against the individual State commissioners.

III. Waiver

Bell Atlantic's waiver argument relies on two provisions of the 1996 Act: 47 U.S.C. § 252(e)(5) and § 252(e)(6). Section 252(e)(5) clearly implies that a State commission need not make determinations under § 252. It provides:

> If a State commission fails to act to carry out its responsibility under this section [§ 252] in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

Even though the Act commands State commissions to make determinations under § 252, *see, e.g.*, §§ 252(b)(4)(C), 252(c), 252(e)(1), 252(f)(3), subsection (e)(5) assumes that a State commission can refuse these commands, in which case the FCC must act in place of the State commission. It follows, therefore, that if a State commission elects *not* to make any § 252 determinations in the regulation of interconnection agreements, its determinations cannot be the subject of federal review under § 252(e)(6). That provision indeed reads:

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the [FCC] under such paragraph and any judicial review of the [FCC's] actions shall be the exclusive remedies for a State commission's failure to act.

Bell Atlantic argues logically from these provisions that a State commission that elects to make § 252

determinations must, of necessity, also be electing to have its determinations reviewed by a federal court under § 252(e)(6), for that provision continues:

> In any case in which a State commission makes a determination under this section [§ 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section [§ 252].

But it is a leap of logic to infer from this consent to federal-court review a consent by a State commission itself *to be made a party* to that federal review. Section 252(e)(6) provides for federal court review of State commission *determinations*, but it does not provide that the State commission thereby agrees to be named as a party in federal court or that it waives its Eleventh Amendment immunity. At most, such a conclusion would be implicit, and only then if it were a legal necessity that a State commission be sued in order to have its decision reviewed.

The parties do not agree whether a State commission is an indispensable party to a review of its determination. In a peculiar lineup of positions on this point, the State maintains that, although the State commission is not subject to suit, its participation in any review of a commission determination is indispensable, while Bell Atlantic suggests that this may not be so. Maryland law provides some support for Bell Atlantic's position, because under Maryland law, the Public Service Commission may, but need not, be a party to reviews of its decisions. *See* Md. Code Ann., Pub. Utils. Cos. § 3-204(d). In any event, the uncertainty surrounding the indispensable-party issue serves to underscore the weakness of Bell Atlantic's argument for waiver of Eleventh Amendment immunity. This argument requires two heroic assumptions: (1) that the authorization of review in § 252(e)(6) operates as a condition to State commission regulatory authority,

and (2) that a State would expect "review" necessarily to entail suit in which the State commission is named as a party.

This argument is strikingly reminiscent of, and arguably weaker than, the argument made by the injured employee in *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184 (1964), *overruled by College Savings Bank*, 527 U.S. 666. In *Parden*, the Supreme Court authorized the employee to bring an action under the Federal Employers' Liability Act ("FELA") against a railroad owned and operated in interstate commerce by the State of Alabama because the FELA subjected "every" railroad in interstate commerce to an employee negligence suit in federal court. The Court held:

> [B]y enacting the FELA . . . Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

Parden, 377 U.S. at 192. This is precisely the argument that Bell Atlantic makes to find waiver in this case.

But the principle on which Bell Atlantic's argument rests was expressly overruled last year (1999) in *College Savings Bank*, 527 U.S. at 680-83. In repudiating *Parden*'s constructive waiver doctrine, *College Savings Bank* emphasized that the doctrine did not square with the requirement that "a State's express waiver of sovereign immunity be unequivocal." 527 U.S. at 680. Indeed, the Court noted that "in the context of other constitutionally protected privileges," constructive waivers are "simply unheard of." *Id.* at 681. Stated otherwise, Congress cannot extract a constructive waiver from a State without "having plainly stated its intention that participation by a state

in the regulated activity would be deemed an implied waiver of immunity." *Abril v. Virginia*, 145 F.3d 182, 189 n.13 (4th Cir. 1998) (citing *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478 (1987) (plurality opinion)). These principles follow from the deeply rooted stricture that the decision to waive sovereign immunity must be "altogether voluntary on the part of the sovereignty." *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858).

In *College Savings Bank*, the Court distinguished a *Parden*-style, constructive waiver from circumstances in which a State may implicitly waive its sovereign immunity by accepting from Congress a "gift" or a "gratuity," the receipt of which is made conditional on the State's waiver of immunity. *See* 527 U.S. at 686-87 (citing *South Dakota v. Dole*, 483 U.S. 203 (1987), and *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959)). The Court's distinction was based on the fact that, in *Parden*, if the State wished to preserve its immunity in the face of the FELA, it would be required to forsake the otherwise *legal* activity of running a railroad, whereas under *Dole* and *Petty*, the State could preserve its immunity simply by turning down the gift or gratuity, something to which it was not otherwise legally entitled. The Court acknowledged that the distinction between forswearing a gift and garnering a sanction would disappear, for example, if Congress conditioned the receipt of funds so substantial that a State was, in effect, compelled to accept them. *See* 527 U.S. at 687. The Court indicated, however, that at least with respect to funding legislation, it could well be beyond Congress' power to offer such a choice under the "coercion" limitation to Congress's Spending Clause power articulated in *Dole*. *See id.* (citing *Dole*, 483 U.S. at 211); *see also Litman*, 186 F.3d at 553.

Regardless of whether there is a categorical limitation on Congress' power to condition a State's receipt of a gift or gratuity on a waiver of immunity, it is certain that a congressional gift in the form of federal

funds will not validly waive a recipient State's Eleventh Amendment immunity unless Congress "manifest[s] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247. Congress' grant to States of conditional funds is "in the nature of a contract," the legitimacy of which "rests on whether the State voluntarily and knowingly accepts the terms." *Pennhurst I*, 451 U.S. at 17 ("There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it"). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their acceptance from Congress of a gift or gratuity.

If Congress is not unmistakably clear and unequivocal in its intent to condition a gift or gratuity on a State's waiver of its sovereign immunity, we cannot presume that a State, by accepting Congress' proffer, knowingly and voluntarily assented to such a condition. This requirement insures that all branches of the federal government respect the constitutional stature of Eleventh Amendment immunity and accord State sovereign immunity the protection of other constitutional rights, which will not be waived absent the "intentional relinquishment or abandonment of a known right or privilege." *College Savings Bank*, 527 U.S. 681-82 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

We have examined the Telecommunications Act of 1996 for a clear statement of congressional intent to condition participation in the regulation of telecommunications on a State's waiver of sovereign immunity, knowing that Congress knows well how to express such an intent and has done so in the context of numerous civil rights statutes. Although passed under Congress' Spending Clause power, the Rehabilitation Act offers an example. *See Litman*, 186 F.3d at 553-54. That act

states outright that a State "shall not be immune under the Eleventh Amendment . . . from suit in Federal court" for a violation of the act's anti-discrimination edict. 42 U.S.C. § 2000d-7(a)(1). We readily concluded in *Litman* that any State reading that provision would clearly understand that, by accepting Title IX funding, it was consenting to resolve disputes regarding alleged violations of the Act's anti-discrimination provisions in federal court. *See* 186 F.3d at 554.

By contrast, an examination of the language of § 252(e)(6) leads to the inexorable conclusion that Congress did not clearly manifest an intent—if it had such an intent at all—to condition State utility commissions' participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit. That section provides nothing of the kind. It states:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court.

47 U.S.C. § 252(e)(6). This section simply provides for review of certain State commission determinations in federal court. A State official reading this provision would have no indication that the State commission, if it chose to make the reviewable determination, would be compelled to appear in federal court at the behest of an aggrieved telecommunications company. Even assuming Congress conferred a gift on State utility commissions by allowing them to participate in the regulation of telecommunications—a gift that is difficult to discern[3]—the language of § 252(e)(6) simply

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[3] The district court noted that the Act "stripped the states of local power to regulate telecommunications that had been vested in them for decades," and remarked, "Some gift." *Cf.* Virgil, *Aeneid*, bk. II, l. 49 ("Whatever it is, I fear Greeks even when they bear gifts" (reporting the comments of the Trojan priest Laocoon upon seeing the large wooden

falls short when examined under our "stringent" tests for determining whether a State has waived its immunity from federal court jurisdiction. *See Atascadero*, 473 U.S. at 241, 246-47 (finding that § 505 of the Rehabil-itation Act, which provides for suits in federal court against "any recipient of Federal assistance" fell "far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity"); *but see AT&T Communications v. BellSouth Telecomms.*, ___ F.3d ___, 2001 WL 38281, at *9 (finding waiver of Eleventh Amendment immunity from suits brought under § 252); *MCI Telecomms. v. Illinois Bell*, 222 F.3d at 342-44 (same); *MCI Telecomms. Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 938-39 (10th Cir. 2000) (same).

Bell Atlantic and the United States argue insistently that the State of Maryland has no inherent right to partake in any role administering the scheme of the 1996 Act. They contend that the State had a clear choice—laid out in § 252(e)(5)—either to participate in the regulation of interconnection agreements or to forego such a role and allow the FCC to act in its stead. This argument, however, misses the mark. The implication of exercising the choice given in § 252(e)(5) is to have a State commission's decisions reviewed in federal court, *not to waive the State's sovereign immunity and subject the State commission itself to suit in federal court*. "[W]e require an unequivocal indication that [a] State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero*, 473 U.S. at 238 n.1. As the Court confirmed in *College Savings Bank*, "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." 527 U.S. at 680.

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horse left by the Greeks as a "gift" to the city of Troy)).

Bell Atlantic's arguments that the preempted or "preemptable" nature of the telecommunications field somehow alters our inquiry into whether the State of Maryland waived its Eleventh Amendment immunity also lack merit. Congress may not subject States to suit in federal court merely by partially or fully preempting the regulation of a field under its commerce power. If we were so to find, we would have to ignore the holding of *Seminole Tribe* that Congress does not possess the power to abrogate a State's Eleventh Amendment immunity under its Article I powers. *See* 517 U.S. at 72-73. It is not enough that a State's waiver of immunity is convenient to the 1996 Act's regulatory scheme or practical for the development of a uniform body of law under the 1996 Act. Our clear-statement inquiry is invariable, and we have searched in vain for any statement of congressional intent to condition a State utility commission's participation in the 1996 Act's regulatory scheme on the waiver of its constitutionally predicated sovereign immunity.

IV. *Ex Parte Young*

Bell Atlantic and the United States maintain that, in any event, Maryland's sovereign immunity does not bar an action against the State commissioners in their official capacity to enjoin ongoing violations of federal law under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). They seek to draw upon this "limited exception to the Eleventh Amendment immunity for the limited purpose of declaring and enjoining relief to redress the Public Service Commission's violation of federal law in misconstruing the 1996 Act." They maintain that the State commission's decision allowing reciprocal compensation for local telephone calls to Internet service providers violates the federal understanding of the Telecommunications Act, as manifested in the 1999 FCC Ruling, which, subsequent to briefing in this case, was vacated and remanded by the District of Columbia Court of Appeals to the FCC for further consideration.

The Maryland State officials argue that when Congress has provided a detailed remedial scheme for enforcement of federal law against State interests, the doctrine of *Ex parte Young* should not be applied to traverse the limits of that federal scheme. They assert that if the doctrine of *Ex parte Young* were applied to subject them to suits by private citizens to enforce the Telecommunications Act, they "would be exposed to a more severe action than anticipated by § 252(e)(6). . . . Section 252(e)(6) only allows for a review of an interconnection agreement whereas an *Ex parte Young* action against a State commission would expose the Commissioners to the full remedial powers of a federal court, including presumably, contempt sanctions." These State commissioners also note that § 252(e)(6) refers only to actions involving determinations by the State commission itself, not by its individual commissioners.[4]

The district court agreed with the State commissioners' position. It read the 1996 Act as manifesting Congress' intent to authorize actions against the State commissions, as distinct from individual State commissioners.

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[4] We note that the Telecommunications Act defines "State commission" to mean "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 153(41). Under Maryland law, both general power and supervisory and regulatory power over public service companies is conferred on "the Public Service Commission." Md. Code Ann., Pub. Utils. Cos. §§ 2-101, 2-112, 2-113. When the Public Service Commission enforces its orders, it does so in the Commission's name, *see id.* § 2-117(a), and when a regulation of the Commission is challenged, the Commission in its name must be made a party, *see id.* § 3-201(b). Finally, in any proceeding seeking judicial review of the Maryland Public Service Commission, the Commission may participate as a party. *See id.* § 3-204(d). Nowhere under the State public utilities law is regulatory power conferred upon an individual commissioner and nowhere is an individual commissioner made subject to suit for the Public Service Commission's regulatory actions.

In approaching the question of whether the doctrine of *Ex parte Young* permits Bell Atlantic's suit against State commissioners, we begin with the recognition that the scope of interests that *Ex parte Young* protects in preventing violations of federal law must be carefully circumscribed so as not unduly to erode the important underlying doctrine of sovereign immunity. *See Coeur d'Alene Tribe*, 521 U.S. at 269-70. Thus, just because a private citizen's federal suit seeks declaratory injunctive relief against State officials does not mean that it must automatically be allowed to proceed under an exception to the Eleventh Amendment protection. Such "empty formalism" would improperly sacrifice the "real interests served by the Eleventh Amendment." *Id.* at 270. In *Coeur d'Alene Tribe*, a federally recognized Indian tribe and tribe members sued the State of Idaho and State officials over the right to submerged lands in Idaho. The court held that even though this suit was for declaratory and injunctive relief against State officials, the *Ex parte Young* doctrine did not authorize the suit:

> It is apparent, then, if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The dignity and status of its statehood allow Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

Id. at 287-88. This holding reflects a considered evaluation of the degree to which a State's sovereign interest would be adversely affected by a federal suit seeking injunctive relief against State officials.

This case-by-case approach to application of the *Ex parte Young* doctrine is exemplified further by the Supreme Court's earlier holding in *Seminole Tribe*,

where the court also refused to apply *Ex parte Young* in circumstances where to do so would alter the remedial scheme selected by Congress to enforce federal law.

> Therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.

Seminole Tribe, 517 U.S. at 74.

Accordingly, to determine whether *Ex parte Young* authorizes this suit against State officials, we must evaluate the federal interests served by permitting a federal suit against individual members of the Maryland Public Service Commission, taking into account the remedial scheme for enforcement of federal law that Congress has established in the Telecommunications Act of 1996. Then, with those federal interests understood, we must determine whether the federal suit would unduly sacrifice the important value of Maryland's sovereign immunity.

The federal interest furthered by the 1996 Act is to have § 252 determinations made by State commissions reviewed in federal court. Explicitly, the 1996 Act authorizes the party "aggrieved" by a *State commission* determination to file a suit in federal court "to determine whether [an interconnection] agreement . . . meets the requirements of section 251 and [section 252]." 47 U.S.C. § 252(e)(6). No interest is manifested by the 1996 Act to discipline individual State officials or to expose them to any liability. The limit of the stated interest is the "review" of certain State commission decisions. And under Maryland law, it is not necessary for the State commission, much less the individual commissioners, to be a party to an appeal for State- court review of its determinations. *See* Md. Code Ann., Pub. Utils. Cos. § 3-204(d). We may fairly conclude that the 1996 Act's interest is in federal review,

and no more, and this interest would not be frustrated if we were to preserve the Eleventh Amendment immunity of State officials with respect to such suits.

Moreover, in this case, it is not altogether clear that Bell Atlantic's action is designed to prevent an ongoing violation of federal law, a requirement that "[t]he Supreme Court has not shown a propensity to relax." *Booth*, 112 F.3d at 142 (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 89 (1989); *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986); and *Green*, 474 U.S. at 68). The dispute between Bell Atlantic and MCI required the State commission to construe the parties' voluntarily negotiated interconnection agreement. In interpreting this agreement, the Maryland Public Service Commission found that Bell Atlantic and MCI intended to treat ISP-bound telephone calls as local traffic for the purposes of paying reciprocal compensation. For this determination to constitute an ongoing violation of federal law—and thus to provide a basis for a suit against the commissioners under the doctrine of *Ex parte Young*—the agreement of the parties, as interpreted and enforced by the commission, would have to be inconsistent with federal law. *See Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that judicial enforcement of racially discriminatory private agreements constitutes State action in violation of the Equal Protection Clause of the Fourteenth Amendment). Bell Atlantic contends that the FCC ruling (now vacated) provides grounds for its assertion that its agreement with MCI is inconsistent with federal law, and the enforcement of the agreement amounts to an ongoing violation of federal law. This position is questionable.

The now-vacated FCC Ruling did indeed classify local calls to Internet service providers as "jurisdictionally mixed" and concluded that they "appear[] to be largely interstate." FCC Ruling, 14 FCC Rcd at 3690 (¶ 1), *vacated, Bell Atl. Tel. Cos.*, 206 F.3d 1. But far from interpreting the Telecommunications Act as prohibiting agreements to pay reciprocal compensation

for such calls, the FCC Ruling emphasized that "[t]his conclusion, however, does not in itself determine whether reciprocal compensation is due in any particular instance." *Id.* The FCC advised that "[i]n the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we . . . conclude that parties should be bound by their existing interconnection agreements, as interpreted by state commissions." *Id.* Later in its ruling, the FCC emphasized that "parties may voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law." *Id.* at 3703 (¶ 22). The FCC identified several factors that could inform a State commission's determination of whether parties to interconnection agreements agreed to pay reciprocal compensation for ISP-bound traffic, emphasizing that the factors "are illustrative only," and that "state commissions, not this Commission [the FCC], are the arbiters of what factors are relevant in ascertaining the parties' intentions." *Id.* at 3704 (¶ 24). It is hard to conceive how the Public Service Commission can be said to have perpetrated an ongoing violation of federal law by following the dictates of the federal agency authorized to implement that law, especially when the charging party relies on the federal agency's interpretation as authoritative.

The 1996 Act also furnishes little basis for concluding that an interconnection agreement providing for the payment of reciprocal compensation for the termination of ISP-bound calls is inconsistent with the requirements of federal law. Section 251(b) states simply that "[e]ach local exchange carrier has . . . [t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). Although § 251(b)(5) thus purports to extend the duty of reciprocal compensation to all "telecommunications," the FCC's implementing regulations interpret the requirement as limited to "local telecommunications traffic." 47 C.F.R.

§ 51.701(a) ("The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers"); *see also Bell Atl. Tel. Cos.*, 206 F.3d at 4.

Bell Atlantic argues that, in its interconnection agreement with MCI, the parties agreed to incorporate emerging standards of federal law, such that their reciprocal compensation obligations were subject to change if prevailing federal definitions of local and interstate traffic changed. It is a question of State law, however, whether the interconnection agreement at issue in this case includes a dynamic incorporation of statutory interpretation, including the definition of which calls constitute local calls subject to reciprocal compensation. It would not appear that the Maryland Public Service Commission could be charged with perpetrating an ongoing violation of federal law by virtue of its resolution of this matter of State contract law. The State commission construed the interconnection agreement at issue in this case in accordance with its conclusions about the parties' intent on the issue of how to classify ISP-bound calls. The State commission made quite clear that this was a matter of contract interpretation, citing *Denice v. Spotswood I. Quinby, Inc.*, 237 A.2d 4, 7 (Md. 1968), for the proposition that "unless a contract provides otherwise, the law applicable at the time and place the contract is entered into is to be considered a part of that contract." The State commission found no indication in the contract that the parties wished to incorporate evolving federal standards into their agreement, finding instead that Bell Atlantic agreed to treat ISP-bound calls as local, in conformance with the then-prevailing regulatory interpretation and industry custom.

In short, it does not appear that Bell Atlantic can allege an ongoing violation of federal law when the State commission determines as a matter of State contract law that the parties agreed to treat ISP-bound calls as

local for purposes of reciprocal compensation. Certainly this conclusion does not violate the § 251(b)(5) mandate that carriers establish reciprocal compensation arrangements. And the (now-vacated) FCC ruling, on which Bell Atlantic relies to assert an ongoing violation of federal law, explicitly allows for a result of the kind reached by the State commission in this case. If at a later date, the FCC should establish an appropriate interstate compensation mechanism for ISP-bound traffic and should forbid local carriers from agreeing to treat these calls as local for purposes of reciprocal compensation, we fully expect that the Maryland State Public Service Commission would follow through with its stated intent under those circumstances to revisit its determination. Indeed, it stated in its decision that its determination would "only apply until the FCC issues an order creating its inter-carrier compensation mechanism for ISP-bound traffic."

In addition to the doubts we have about whether any significant federal interest counsels the naming of State commissioners as parties to an action reviewing their decision as a body and whether the determination made by the State commission amounts to a violation of federal law, it appears that Congress believed that the federal interest would be adequately served by the limited federal court review prescribed by 47 U.S.C. § 252(e)(6) and the State-court review indicated otherwise by the 1996 Act. See our discussion in Part IV, below.

Section 252(e)(6) invokes federal court review only for State commission determinations made under § 252 to determine whether interconnection agreements are in compliance with §§ 251 and 252. *See* 47 U.S.C. § 252(e)(6). If, however, we were to permit an *Ex parte Young* action to proceed against State officers, presumably to answer to a federal court injunction and potentially to face sanctions for non-compliance with that injunction, we would be supplementing the narrowly defined federal court review selected by

Congress. The Supreme Court in *Seminole Tribe* instructs that this is not to be done under the guise of *Ex parte Young*: "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon Ex parte Young." 517 U.S. at 74.

In sum, when evaluating the federal interests that would be served by a suit against the individual members of the Maryland Public Service Commission, we conclude that (1) the State commissioners are probably not indispensable parties to federal review of the State commission's determinations; (2) in any suit against State commissioners, it is more likely that State-contract-law, rather than federal-law, violations would be redressed; and (3) a federal court action against State commissioners of this type would improperly expand the federal remedy selected by Congress.

Against these dubious federal interests, we weigh the serious offense to the dignity of a State's quasi-judicial body. The Maryland Public Service Commission acts as a court, and its decisions are reviewable as a court in higher courts. In this case, there is no suggestion that the State commission and the individual State commissioners did not strictly act within the scope of the authority conferred on them both by federal and State law. They disposed of the matter before them conscientiously and issued separate decisions to explain and support their split judgment.

To bring these State officers before a federal court to answer to the assertion of a private citizen that in acting within the scope of their authority, they made the wrong decision would be an affront to the sovereignty of the State of Maryland and would undermine the mutual respect that characterizes the relationship between the federal and State sovereigns. It would be difficult to conceive of a more central challenge to sovereign immunity, which is protected generally in

federal court by the Eleventh Amendment. Accordingly, in the specific circumstances of this case, we conclude that *Ex parte Young* does not authorize suit against the individual members of the Maryland Public Service Commission. *But see AT&T Communications v. BellSouth Telecomms.*, ___ F.3d ___, 2001 WL 38281, at *11 (concluding that suits challenging state commission interpretations of interconnection agreements are "straightforward" *Ex parte Young* cases); *MCI Telecomms. v. Illinois Bell*, 222 F.3d at 345 (same); *MCI Telecomms. v. Public Serv. Comm'n of Utah*, 216 F.3d at 939-40 (same); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000) (same).

V. Jurisdiction under the 1996 Act

The Eleventh Amendment decisions thus reached preserve the sovereign immunity of the State of Maryland and its officials acting in their official capacity and bar Bell Atlantic's action against them in federal court. The private telecommunications carriers, however, do not enjoy sovereign immunity. But applicable to them, the State, as an alternative defense, challenged the federal courts' subject matter jurisdiction, an issue that must be decided as to the action against the private carriers even though they do not themselves challenge subject matter jurisdiction. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (appellate courts have a "special obligation" to evaluate subject matter jurisdiction); *Plyler v. Moore*, 129 F.3d 728, 731 n.6 (4th Cir. 1997) (subject matter jurisdiction must be considered whenever raised or even *sua sponte*).

The State contends that the district court lacked subject matter jurisdiction over "enforcement decisions rendered by State commissions" and that therefore this action should have been dismissed. It argues that the plain language of 47 U.S.C. § 252(e)(6) in the 1996 Act grants jurisdiction to federal district courts only to review "determinations" made under § 252 and that

such review is for the limited purpose of ascertaining whether an interconnection agreement complies with 47 U.S.C. §§ 251 and 252. It asserts that the language of § 252(e)(6) does not authorize federal review of State commission orders *enforcing* an approved interconnection agreement on the complaint of a party that the agreement has been breached. It maintains that the 1996 Act leaves jurisdiction for judicial review of such enforcement actions with State courts and that the Act "did not intend to totally divest State courts of jurisdiction." Indeed, it notes that this allocation of authority is not cause for consternation because State courts have inherent authority to adjudicate claims even if they arise under the laws of the United States.

Bell Atlantic argues that the enforcement of interconnection agreements that State commissions have approved as part of their responsibilities under § 252 falls within State commissions' "plenary authority." It asserts that other circuits have adopted that position, as has the FCC. *See, e.g., Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999); FCC Ruling, 14 FCC Rcd at 3703 (¶ 22) (1999) (agreements under §§ 251 and 252 are "interpreted and enforced by the state commissions"), *vacated, Bell Atl. Tel. Cos.*, 206 F.3d 1. Bell Atlantic reasons that because a State commission has implied authority under § 252 to interpret and enforce agreements it approves under § 252, any decision interpreting or enforcing the terms of an interconnection agreement is therefore a "determination" under § 252 that is reviewable in federal court under § 252(e)(6). *See* 47 U.S.C. § 252(e)(6) (providing federal review of State commission "determinations" made under § 252).

MCI also contends that federal courts have jurisdiction over this dispute. It argues that § 252(e)(6) must be read "in context and in light of the [1996] Act's

structure and purpose," and that when so read, the federal jurisdiction provision does not limit review only to State commission decisions approving interconnection agreements. Rather, MCI asserts, it must be read more broadly to grant federal courts responsibility for assuring that interconnection agreements are interpreted in compliance with federal law. In contrast to Bell Atlantic, however, MCI asserts that "[t]he Act leaves resolution of state law claims to state courts," so § 252(e)(6) does not permit a federal court to review a State commission's enforcement action for compliance with State law.

To determine the proper scope of 47 U.S.C. § 252(e)(6), which confers jurisdiction on federal courts to review only *some* State commission determinations, it is necessary to understand the overall structure and purpose of the Act. This is because the 1996 Act creates a patchwork of federal and State responsibilities to manage the intended transition from the regulation of telecommunications monopolies to unregulated competition and because the establishment of such a patchwork regime appears to have been a deliberate decision on the part of Congress as a means of preserving State regulatory structures to assist in managing the transition.

A

Under the Federal Communications Act of 1934, telephone service was treated as a natural monopoly, and regulatory responsibility was divided between the FCC, which regulated interstate, long-distance service, and State public service commissions, which regulated intra-state service. *See, e.g.*, 47 U.S.C. § 152(a), (b); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986). Indeed, 47 U.S.C. § 410 created a joint federal-state board to resolve regulatory jurisdictional disputes. Without reviewing here the involved history of telecommunications regulation since the enactment of the 1934 Act, it is sufficient to observe that the 1996

Act did not supplant the 1934 Act, and importantly, it did not repeal 47 U.S.C. §§ 152 and 410. Rather, the 1996 Act amended the 1934 Act, leaving much of the 1934 Act's structure in place. In amending the 1934 Act with the 1996 Act, however, Congress appears to have abandoned its hands-off approach to intrastate commerce and undertaken to impose competition in both the interstate and intrastate arenas. In addition, Congress sought to facilitate the convergence of technologies in telephone service, broadcast (radio and TV) service, cable service, satellite service, and other miscellaneous transmission services. But Congress left in place many of the traditional functions of State public utility commissions. At bottom, by enacting the Telecommunications Act of 1996, Congress intended "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996).

By merely amending the 1934 Act and by continuing to employ the resources and expertise of State public service commissions, Congress manifested an intent not to raze the pre-1996 statutory landscape and build an entirely new statutory system. Rather, the 1996 Act partially flooded the existing statutory landscape with specific preempting federal requirements, deliberately leaving numerous islands of State responsibility. With respect to some of these State islands, the Act mandates that State commissions apply federal law within their existing State procedural structures. Thus, for example, State commissions are required to apply federal requirements in arbitrating and approving interconnection agreements. *See* 47 U.S.C. § 252(c), (e). With respect to other State islands, the Act actually conscripts State governmental agencies for federal purposes. *See, e.g.*, 47 U.S.C. § 251(f) (mandating that State commissions conduct inquiries for the purpose of terminating rural telephone company

exemptions); 47 U.S.C. § 332(c)(7) (requiring local zoning boards to apply federal procedural standards in approving the siting of telecommunications towers and facilities).[5] Still other areas of pre-1996 State interests are completely inundated by federal preemption, such as in the area of satellite service. *See, e.g.*, 47 U.S.C. § 303(v). In some instances, preemption in the Act is deferred and conditional, to be effected on a case-by-case approach. *See, e.g.*, 47 U.S.C. § 252(e)(5) (directing the FCC to issue order "preempting the State commission's jurisdiction" of a proceeding if the State commission "fails to act to carry out its responsibility"); 47 U.S.C. § 253(d) (directing the FCC to "preempt the enforcement" of any State statute or regulation that has the effect of denying a carrier the ability to provide any interstate or intrastate telecommunications service).

No generalization can therefore be made about where, as between federal and State agencies, responsibility lies for decisions. The areas of responsibility are a patchwork and the dividing lines are sometimes murky, prompting one authority to observe:

> In a mandatory if pro-forma gesture to the states, the Act declares that it does not implicitly preempt any state or local law. In 280 plus pages of text, however, implicit repeals are hardly needed. There is plenty of explicit language to construe, and abundant ambiguity about just who's in charge, on which issues. The new legislation's division of legal authority between federal and state regulators will likely be litigated for many years to come.

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[5] While the State of Maryland hinted in its brief that this aspect of the 1996 Act violates the Tenth Amendment and stated at oral argument that it regretted not having argued this point explicitly, whether these conscriptions of State agencies violate the Tenth Amendment is not before us. *Cf. Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688, 699-705 (4th Cir. 2000) (opinion of Niemeyer, J.).

Peter W. Huber, Michael K. Kellogg & John Thorne, *The Telecommunications Act of 1996* § 1.2.12 (1996). What is certain is that Congress intended to divide responsibility, and unless it *expressly* provided for federal responsibility, it left pre-1996 Act assignments of responsibility in place, such as by retaining §§ 152 and 410. In § 601(c)(1) of the 1996 Act, Congress makes this point explicit:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law *unless expressly so provided* in such Act or amendments.

Pub. L. No. 104-104, 110 Stat. 56, 143 (1996) (codified at 47 U.S.C. § 152 note) (emphasis added).

For purposes of determining whether the Act assigns federal courts or State courts the task of reviewing State commission determinations, § 601(c) is consistent with well-established principles for defining federal jurisdiction and therefore is particularly apt. Because federal courts are courts of limited jurisdiction, when their jurisdiction is created by statute, the statute is strictly construed. *See Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 11 (1799) (observing that because federal courts are courts of limited jurisdiction, "the fair presumption is . . . that a cause is without its jurisdiction till the contrary appears").

Thus, determinations by *State* commissions that are not expressly designated for review in federal court are left for review by State courts, as provided by the existing law of the State that created the State commission. The structure in Maryland is typical. The Public Service Commission, consisting of five commissioners, *see* Md. Code Ann., Pub. Util. Cos. § 2-102(a), is given broad and general powers to supervise and regulate all public service companies operating within the State, *see id.* § 2-113. This authority includes the power to adjudicate complaints seeking to "enforce compliance with the requirements of law by public service

companies." *Id.* § 2-113(a)(ii); *see also id.* § 3-102 (authorizing the filing of complaints before the commission). Any "party or person" who is "dissatisfied" with any final decision or order of the Public Service Commission may seek judicial review in the State circuit court for the county where the public service company operates or in the Circuit Court for Baltimore City. *See id.* §§ 3-202(a), 3-204(a). Maryland law authorizes, but does not require, the Public Service Commission to be a party to any such appeal. *See id.* § 3-204(d). Of course, once in court, the parties are entitled to further review by the Maryland Court of Special Appeals. They also may seek review from the Maryland Court of Appeals and the Supreme Court of the United States.

B

Against this general background of the 1996 Act and its patchwork of federal and State responsibility, we now turn to 47 U.S.C. §§ 251 and 252, which govern whether actions to review State commission determinations on the *enforcement*, as distinct from *approval* or *rejection*, of interconnection agreements for local service are to be routed to federal courts or left to State courts.

Section 252(e)(6) of Title 47 provides in relevant part:

> In any case in which a State commission makes a determination under this section [§ 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the [interconnection] agreement . . . meets the requirements of section 251 and this section [§ 252].

Because it is clear that this section provides for direct federal court review of State commission "determination[s]" made "under this section [§ 252]," we need only identify what determinations a state commission is

authorized to make under § 252 to ascertain the scope of federal jurisdiction. Determinations made pursuant to authority other than that conferred by § 252 are, by operation of § 601(c) of the 1996 Act, left for review by State courts. *See* 47 U.S.C. § 152 note.

Section 251 of Title 47 lifts monopolistic barriers against insurgent or competing telecommunications carriers by mandating interconnection agreements among carriers and by imposing a duty on carriers to agree to terms that promote seamless service to consumers. Section 251 also directs the FCC to promulgate regulations to implement the section, at the same time commanding it to preserve State regulations that are consistent with § 251. *See* 47 U.S.C. § 251(d)(3).

Section 252, entitled "Procedures for negotiation, arbitration, and approval of agreements," creates the procedural framework for implementing the commands of § 251. Section 252 defines two separate courses leading to the formation of interconnection agreements—one by negotiation (including mediation) and the other by compulsory arbitration. Agreements arrived at through negotiation must be submitted to the appropriate State commission, which "shall approve or reject the agreement, with written findings as to any deficiencies." 47 U.S.C. § 252(e)(1); *see* 47 U.S.C. § 252(a). But the State commission may only reject a *negotiated* agreement if it finds either that (1) the agreement discriminates against a nonparty telecommunications carrier or that (2) the agreement "is not consistent with the public interest, convenience, and necessity." 47 U.S.C. § 252(e)(2)(A). Section 252(e) also permits State commissions to impose State-law requirements in its review of interconnection agreements. *See* 47 U.S.C. § 252(e)(3). Any party "aggrieved" by the State commission's determination approving or rejecting a negotiated agreement may "bring an action in an appropriate Federal district court" to test the agreement against the requirements of §§ 251 and 252. 47 U.S.C. § 252(e)(6). And § 252(e)(4) makes

this limited federal review exclusive, stating that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section [§ 252]."

If an agreement cannot be reached through negotiation or mediation under § 252(a), a party may petition the State commission for compulsory arbitration, setting forth the specific issues upon which agreement cannot be reached. The State commission is directed to arbitrate and resolve the disputed issues, including those raised in the response to the arbitration petition. *See* 47 U.S.C. § 252(b)(4). In conducting the arbitration, the State commission is required (1) to ensure compliance with § 251, (2) to establish rates for interconnecting services, and (3) to provide a schedule for implementation of the interconnection agreement. *See* 47 U.S.C. § 252(c). Once the disputed issues are thus resolved through compulsory arbitration, the entire agreement is submitted to the State commission for approval or rejection. But unlike an agreement reached through *negotiation*, where the grounds for rejection by the State commission are limited to discrimination and inconsistency with the public interest, convenience, and necessity, an *arbitrated* agreement is reviewed by the State commission for compliance with the more comprehensive requirements of § 251 (establishing multiple interconnection requirements) and § 252(d) (establishing pricing standards). Finally, as with the State commission's determination approving or rejecting a negotiated agreement, any party "aggrieved" by the State commission's determination approving or rejecting an arbitrated agreement may bring an action in an appropriate federal district court, again "to determine whether the agreement . . . meets the requirements" of §§ 251 and 252. 47 U.S.C. § 252(e)(6).

In short, § 252(e)(6) confers jurisdiction on federal courts to review State commission "determinations" made under § 252 "to determine whether the agreement . . . meets the requirements of section 251 and

this section [252]." While this federal jurisdictional provision authorizes review of § 252 arbitration determinations ultimately leading to the formation of interconnection agreements, in the final analysis, the State commission determinations under § 252 involve only approval or rejection of such agreements.[6] With respect to negotiated agreements in particular, the federal review is narrower. The *only* "determination" that can be made by the State commission under § 252 on a negotiated agreement is a determination to approve or reject it, and when the agreement is approved by the State commission, then there is a question whether there can be any "party aggrieved" to seek review in federal court.

With respect to any determination made by a State commission that is not a § 252 determination, judicial review is left for review as specified by State law for review of State commission actions. Again, this conclusion is confirmed by § 601(c)(1) of the 1996 Act, which states that the Act is not to be construed "to modify, impair or supersede . . . state, or local law *unless expressly so provided* in [the 1996 Act]," 47 U.S.C. § 152 note (emphasis added), and by the general principle

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[6] We note that the FCC recently ruled that the Virginia State Corporation Commission, by declining jurisdiction to interpret or enforce an existing interconnection agreement, had "fail[ed] to carry out its responsibility under [§ 252]," which, under § 252(e)(5), directs the FCC to preempt the jurisdiction of the State commission to act in that proceeding. *See In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Memorandum Opinion and Order, FCC 00-216, CC Docket No. 00-52 (June 14, 2000) ("*Starpower Communications*"). Because Starpower Communications interprets the meaning of State commission "responsibilities" under § 252 in the context of a State commission's failure to take action, rather than in the context of State commission "determinations" which are reviewable in federal court under § 252(e)(6), we find that this ruling does not bear on this case. Federal court jurisdiction to review State commissions could reasonably be interpreted to be more narrow in scope than the FCC's duty to act in place of a State commission that failed to act.

that we should not infer a grant of federal jurisdiction unless Congress manifests its intent to confer jurisdiction.

In this case, an interconnection agreement was voluntarily negotiated and reached between Bell Atlantic and MCI. The agreement was submitted to the Maryland Public Service Commission, which approved the agreement, and no party challenged that approval. It would appear therefore that there has been no § 252 "determination" left for review in the federal courts by virtue of § 252(e)(6). The only "determination" that the State commission made under § 252 was to approve the agreement and no party now seeks to review that determination; indeed, no party was thereby aggrieved.

Only after the agreement was negotiated and approved did MCI file a complaint with the Maryland Public Service Commission, taking the position that telephone calls made to local exchanges for connection to the Internet were local calls subject to reciprocal compensation under the terms of MCI's interconnection agreement with Bell Atlantic. *See* 47 U.S.C. § 251(b)(5) (imposing duty of reciprocal compensation on telecommunications carriers); 47 C.F.R. § 51.711 (elaborating on the duty of reciprocal compensation). That ISP-bound calls were subject to reciprocal compensation was also a position maintained by more than 30 State public service commissions across the country. Bell Atlantic, however, argued logically that a telephone call initiated to an ISP, even though through a local exchange, was nevertheless an interstate call because it did not "terminate" locally. Therefore, it argued, under its interconnection agreement with MCI, such calls were not subject to reciprocal compensation. The Maryland Public Service Commission, however, ruled against Bell Atlantic, and Bell Atlantic appealed the State commission's decision to the Circuit Court for Montgomery County, Maryland. The State court affirmed the commission's decision, and no further appeal was taken.

In ruling against Bell Atlantic, the Maryland Public Service Commission noted that if the FCC were to issue a ruling that declared calls to Internet service providers to be interstate calls, it would revisit its decision. The FCC did thereafter declare that ISP-bound traffic was interstate, not local, traffic, and therefore that such calls were not subject to reciprocal compensation, as provided for in 47 U.S.C. § 251(b)(5). *See* FCC Ruling, 14 FCC Rcd 3689, *vacated*, *Bell Atl. Tel. Cos.*, 206 F.3d 1. Within a week of the FCC's ruling, Bell Atlantic returned to the Maryland Public Service Commission, requesting that it review its earlier decision in light of the FCC's ruling. By a vote of three to two, the Maryland Public Service Commission again rejected Bell Atlantic's position, asserting State authority to decide whether the parties had agreed in their interconnection agreement to treat ISP-bound traffic as local and stating that in any event the commission had authority to require reciprocal compensation even if the parties did not so agree. It reasoned that because ISP-bound calls were treated as local traffic when the parties reached agreement, it was their intent to continue to treat them that way in the agreement. Following this decision by the Public Service Commission, Bell Atlantic sought review in federal court, invoking as the basis for its jurisdiction § 251(e)(6), as well as 28 U.S.C. § 1331 (general federal-question jurisdiction).

Bell Atlantic argues vigorously that State commissions have authority to interpret and enforce interconnection agreements that they approve under § 252. It maintains that this authority falls within State commissions' plenary authority, citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 804, as well as the FCC Ruling, 14 FCC Rcd 3689. The Maryland Public Service Commission and MCI do not disagree. While Bell Atlantic suggests this authority is implicitly conferred by § 252, it would appear that explicit authority is provided by both the 1934 Act and Maryland law. *See* 47 U.S.C. § 152(b); Md. Code Ann., Pub. Util. Cos. § 2-113.

The critical question is not whether State commissions have authority to interpret and enforce interconnection agreements—we believe they do—but whether these decisions are to be reviewed by *State courts or federal courts*.

As we have noted in our analysis of §§ 251 and 252, § 252(e)(6) does not expressly confer jurisdiction on federal courts to review State commission orders enforcing negotiated interconnection agreements. And federal jurisdiction is not to be presumed or implied. Rather, it must result from a specific congressional grant, and when a statute confers jurisdiction to federal courts, we read it strictly. *See Turner*, 4 U.S. (4 Dall.) at 11. The statute conferring jurisdiction on federal courts in this case—47 U.S.C. § 252(e)(6) —authorizes federal review only of "determinations" made by State commissions under § 252. Moreover, the scope of federal court review under that authorization is only to determine whether an interconnection agreement complies with the requirements of §§ 251 and 252.

In this case no question has been raised whether the interconnection agreement between Bell Atlantic and MCI meets the requirements of §§ 251 and 252. The parties voluntarily negotiated the agreement and the Maryland Public Service Commission approved it. Moreover, even now, no party asserts that any term or provision of the agreement is illegal. Thus, no determination made by the Maryland Public Service Commission *under § 252* is being reviewed. The only § 252 determination made by the Public Service Commission was its approval of the interconnection agreement, and that approval is not being reviewed. The dispute in this case arises from the ongoing administration of an approved agreement. While this dispute was properly brought before the Maryland commission and decided by it—both because of the commission's supervisory and regulatory authority over public service companies operating in Maryland and because of the 1934 Act's

general assignment of responsibility to State commissions—the commission's decision was not a § 252 determination and therefore was not reviewable in federal court by virtue of § 252(e)(6). Thus, although the State commission may have had jurisdiction to administer and enforce interconnection agreements, review of such decisions by the commission is taken to the State courts as determined by the State review procedure preserved by the 1996 Act. *See* Md. Code Ann., Pub. Util. Cos. §§ 3-202(a), 3-204(a).

In resolving the jurisdictional question in this case by carefully respecting Congress' division of responsibilities between federal and State spheres, we do not, we believe, adversely impact the national policies promoted by Congress in the Telecommunications Act of 1996. On the contrary, with a view to thousands of approved interconnection agreements that are now in place, Congress appropriately recognized the benefit of employing the vast resources and expertise of State public service commissions to resolve ongoing disputes arising from the administration and interpretation of interconnection agreements. The disputes may amount to tens of thousands of cases. While the lack of uniformity on the question in this case—whether ISP-bound calls are local traffic subject to reciprocal compensation—is generating substantial litigation nationally, the 1996 Act's deliberate choice to preserve pre-1996 procedural structures nevertheless provides a mechanism for working out that difficulty. Indeed, the FCC has already acted within its rulemaking authority to provide a uniform position that ISP-bound calls are not subject to reciprocal compensation. *See* 47 U.S.C. § 251(d); FCC Ruling, 14 FCC Rcd 3689. And while that ruling is currently being revisited, *see Bell Atl. Tel. Cos.*, 206 F.3d 1, inevitably a uniform federal position will emerge, providing guidance to the various State commissions—and the courts that review them —for enforcing interconnection agreements and their provisions for reciprocal compensation.

But any resolution of this dispute that would require us to ignore the language of § 252(e)(6) would modify the complex structure created by Congress and only exacerbate the frustration developing from a lack of uniformity. The statutory language provides unifying mileposts for the courts, and we must be guided by them. Because the Maryland Public Service Commission's determination in this case was not a § 252 determination, its review is expressly not covered by § 252(e)(6). Accordingly, review of the determination must be obtained from State courts, which, it need not be said, are under no lesser obligation than federal courts to apply governing federal law. *See Testa v. Katt*, 330 U.S. 386 (1947).

Bell Atlantic and MCI argue that this understanding of the scope of jurisdiction conferred by § 252(e)(6) conflicts with rulings made by other circuits and, more importantly, with two statements made by the Supreme Court in a footnote to its opinion in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366. However, neither source of authority provides persuasive support for the position urged by Bell Atlantic and MCI.

To date, four circuits have directly confronted the jurisdictional question presented here—whether § 252(e)(6) authorizes federal court review of commission actions *enforcing* interconnection agreements—the Fifth, Seventh, Eighth, and Tenth Circuits.[7] And only the Fifth and Tenth Circuits conducted any relevant analysis. The Seventh Circuit stated simply, "Decisions of state agencies implementing the 1996 Act are reviewable in federal district courts," without providing analysis to support this broad statement in the context of a suit challenging a commission's interpretation or enforcement actions. *Illinois Bell*, 179 F.3d at 570

[7] The First Circuit acknowledged that it was not "clear" whether § 252(e)(6) permits federal judicial review of State commission actions that are not "approvals or rejections," but did not decide the issue. *Puerto Rico Tel. Co. v. Telecomms. Regulatory Bd.*, 189 F.3d 1, 9-10 (1st Cir. 1999).

(quoting an earlier order in the same case that was similarly devoid of jurisdictional analysis, *see Illinois Bell Tel. Co. v. WorldCom Techs., Inc.*, 157 F.3d 500, 501 (7th Cir. 1998)). And the Eighth Circuit, in dictum and without analysis, first stated its "belie[f] that the enforcement decisions of state commissions would . . . be subject to federal district court review under subsection 252(e)(6)." *Iowa Utils. Bd. v. FCC*, 120 F.3d at 804 n.24. This statement appeared in a footnote in a section of analysis that the Supreme Court held the Eighth Circuit should not have reached because the issue was not ripe for review. *See Iowa Utils.*, 525 U.S. at 386. Then later, it simply deferred to the FCC in finding jurisdiction. *See Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000).

The Fifth Circuit held that "federal court jurisdiction extends to review of state commission rulings on complaints pertaining to interconnection agreements and that such jurisdiction is not restricted to mere approval or rejection of such agreements." *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 481 (5th Cir. 2000). In reaching this conclusion, the court recognized that § 252(e)(6) could be read literally to limit federal review of State commissions to decisions "approving or disapproving, or arbitrating, an interconnection agreement." *Id.* at 479. But the court rejected that reading because it concluded, "We do not think so narrow a construction was intended." *Id.* The court then reasoned that assignment to State commissions "of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of [such] agreements." *Id.* Thus, it concluded, an enforcement action, as an implied State commission power under § 252, is a determination reviewable in federal court. *See also Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 497-98 (10th Cir. 2000). But finding such implied federal jurisdiction conflicts directly with § 601(c)(1) of

the 1996 Act, 47 U.S.C. § 152 note, and with the well-established principle that federal jurisdiction must be found in an explicit grant from Congress. As the analysis above demonstrates, the State commission authority to enforce interconnection agreements derives not from the grant of authority in § 252(e)(1) to approve or reject interconnection agreements, but from the residual authority of State commissions and courts conferred by 47 U.S.C. § 152 and by State law, and preserved by the 1996 Act.

Bell Atlantic and MCI alsc place great stress on two statements made by the Supreme Court in footnote 6 of its opinion in *Iowa Utilities*. *See Iowa Utils.*, 525 U.S. at 378-79 n.6. In the first, the Court stated that

> the question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.

Id. This remark, which was directed at the suggestion that the FCC lacks rulemaking authority with respect to the regulation of local competition, does not resolve the question before us. The statement surely cannot mean that the Act deprived the States of all regulatory authority in the field because this would be inconsistent with the statute itself. *See, e.g.*, 47 U.S.C. §§ 152 note, 251(d)(3), 252(e)(3), 253(b), (c); *see also* H. Conf. Rep. No. 104-458, at 126, *reprinted in* 1996 U.S.C.C.A.N. 124, 137 (Section 252(e) "preserves State authority to enforce State law requirements"). At most, this statement advances the unremarkable proposition that, where the 1996 Act speaks and conflicts with State law, the latter must yield. But the supremacy of federal law can be vindicated in State court as well as federal. *See Testa v. Katt*, 330 U.S. 386.

In the second footnote statement relied upon by Bell Atlantic and MCI, the Court observed that under the

views expressed in both the majority and dissenting opinions, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils.*, 525 U.S. at 379 n.6. Again this must be true, as far as it goes. But it does not go so far as to constitute a jurisdictional ruling. The Court could not have meant to suggest that a federal court has jurisdiction under the Act to review any State commission action whenever the court feels the commission is not acting "in accordance with federal policy." On the contrary, the statement *presupposes* the statutory scope of existing federal jurisdiction and describes its effect; it does not purport to define that scope or extend it. In context, the statement would be just as sensible if the modifier "federal" were removed. The Court was merely emphasizing that the invocation of "what might loosely be called 'States' rights,'" *id.*, was out of place because the issue before the Court was not whether federal law applied, but whether it should be applied with deference given to the FCC's interpretations.

At bottom, 47 U.S.C. § 252(e)(6) authorizes federal court review only of State commission "determinations" made "under this Section [§ 252]," leaving all other review to State courts in the manner that it existed before the 1996 Act. And State commission orders administering and enforcing interconnection agreements are not § 252 determinations. They are routine State commission determinations made by State commissions within their retained powers, and accordingly they are reviewable only by State courts in accordance with State law that the 1996 Act has preserved.

VI. Federal-Question Jurisdiction

Bell Atlantic contends alternatively that subject matter jurisdiction is justified by 28 U.S.C. § 1331, which confers federal jurisdiction over civil actions "arising under the Constitution, laws, or treaties of the United States." We also reject this argument, because

we conclude that in light of the limited grant of federal jurisdiction in 47 U.S.C. § 252(e)(6), the exercise of § 1331 general federal-question jurisdiction would "flout, or at least undermine, congressional intent." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986).

As we detailed in Part V, above, the Telecommunications Act of 1996 carefully divides jurisdiction between the federal courts and the State courts, explicitly admonishing that the 1996 Act should not be construed to change preexisting assignments of responsibility "unless expressly so provided" in the 1996 Act or its amendments. 47 U.S.C. § 152 note. As we likewise noted above, the 1996 Act confers jurisdiction on federal courts to review State commissions' determinations only when the question is whether an interconnection agreement "meets the requirements of section 251 and this section [§ 252]." 47 U.S.C. § 252(e)(6). For review of other State commission determinations, the 1996 Act leaves jurisdiction with the State commissions and courts. It would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it nonetheless intended to have 28 U.S.C. § 1331 override this effort. As we have noted previously about coordinating specific federal jurisdictional statutes with 28 U.S.C. § 1331, section 1331 "is a *general* federal-question statute, which gives the district courts original jurisdiction unless a specific statute assigns jurisdiction elsewhere." *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1154 (4th Cir. 1997).

In addition to this logical coordination of federal jurisdictional statutes, the proper application of § 1331 itself is derived by understanding that the clause "arising under the laws of the United States" requires an analysis of the federal law implicated to determine whether Congress intended the resolution of cases under that law to occur in federal courts. *See generally*,

13B Wright, Miller & Cooper, *Federal Practice & Procedure* § 3562 (1984 and Supp. 2000). Thus, in *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), the Supreme Court, in construing the reach of § 1331, looked carefully at the congressional intent with respect to the federal statute in question to determine whether disputes under *that statute* were intended to be resolved in federal courts or in State courts. Indeed, the circumstances in *Jackson* are closely analogous to those here. Presented with the question of whether federally created contract provisions were to be construed in federal courts under the authority of § 1331 or in State courts, the Court held, looking to the underlying law, that "Congress intended those contracts to be governed by state law applied in state courts." *Id.* at 29; *see also Merrell Dow*, 478 U.S. at 811 ("Congress did not intend a private federal remedy for violations of the statute that it enacted"); *cf. Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806-07 (4th Cir. 1996) (holding that "while routine transactional questions about the sale and transfer of [pollution] allowances are to be resolved [in State court] through application of standard principles of commercial law, the issues about who is entitled to share in the EPA's initial allocation of [pollution] allowances . . . raise questions of federal law" that are "sufficiently substantial to arise under federal law within the meaning of 28 U.S.C. § 1331.").

In this case, Congress created a limited federal right of review of State commission determinations as defined in 47 U.S.C. § 252(e)(6), and otherwise it intended for the right of review to be exercised in State courts. The simple fact that interconnection agreements are "creations of federal law" does not make their interpretation a sufficiently substantial federal question to confer jurisdiction under 28 U.S.C. § 1331. *Jackson*, 457 U.S. at 23; *see also id.* at 21; *International Science*, 106 F.3d at 1154 (describing the Supreme Court's decision in *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), as holding that "notwithstanding the federal

statutory basis, Congress [had] intended that because of the predominance of state issues the cases be litigated in state courts").

Finally, it would violate basic tenets of federalism to conclude, in the absence of specific federal authorization, that a federal court may review a State quasi-judicial body, such as the Maryland Public Service Commission. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476-77 (1983) (noting that federal courts may, if authorized, review State commissions when acting in a *legislative* capacity, as distinct from a *judicial* capacity). We have noted repeatedly that "[a]s a jurisdictional doctrine, *Rooker-Feldman* precludes the lower federal courts from second-guessing the merits of [a] state court judgment."[8] *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 202 (4th Cir. 2000). While strict application of the doctrine requires a final judgment from State courts, the federal intrusion into State affairs is not any less when the judgment issues from a State quasi-judicial body.

Accordingly, we conclude that 28 U.S.C. § 1331 does not provide federal jurisdiction over Bell Atlantic's claims in the circumstances of this case where Congress intended that federal jurisdiction be limited to the grant in 47 U.S.C. § 252(e)(6). *But cf. GTE N., Inc. v. Strand*, 209 F.3d 909, 919 (6th Cir. 2000) (finding § 1331 jurisdiction where § 252(e)(6) jurisdiction was lacking for cases that are "the product . . . of an independent state law proceeding"), *petition for cert. filed*, 69 U.S.W.L. 3087 (U.S. July 17, 2000) (No. 00-101).

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[8] The *Rooker-Feldman* doctrine, providing that lower federal courts are not authorized to review final judgments from State court proceedings, emanates from two Supreme Court decisions: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

VII. Summary of Conclusions

In sum, this federal action by Bell Atlantic against the Maryland Public Service Commission and its individual members in their official capacity is barred by the Eleventh Amendment, and the State parties did not waive that immunity by participation in the regulation of interconnection agreements, because Congress did not manifest an intent that these parties waive Eleventh Amendment immunity as a condition to participation in the federal regulatory scheme.

Moreover, the doctrine of *Ex parte Young* does not provide an exception for the action against the individual State officials because (1) the State officials' decision was based on State contract law and arguably did not involve an ongoing violation of federal law, and (2) the federal interests served in making State officials parties to this federal court action under 47 U.S.C. § 252(e)(6) are marginal, if not nonexistent, and do not outweigh countervailing interests of federalism.

As to the action against MCI and the other LECs, the claims—seeking a declaratory judgment to interpret and an injunction to enforce already approved interconnection agreements—do not fall into the category of actions identified by 47 U.S.C. § 252(e)(6) for resolution in federal court. Such claims are left by the 1996 Act for resolution by State commissions and for review in State courts, and therefore federal courts have no jurisdiction to decide them. Moreover, 28 U.S.C. § 1331 does not operate to confer the jurisdiction that Congress withheld by the 1996 Act.

For these reasons, we affirm the judgment of the district court.

AFFIRMED.

KING, Circuit Judge, dissenting:

It can hardly be stated more convincingly than Justice Scalia already has: "[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). In defiance of Justice Scalia's clear admonition, the majority injects equivocation where once there was certitude. Where order once reigned, chaos now impinges.

I agree there is *no* doubt that federal courts may review the decisions of state regulators such as the Maryland Public Service Commission ("Commission") that enforce interconnection agreements under the Telecommunications Act ("Act"). If Justice Scalia is right, then the majority's position that the Commission and its individual members are entitled to Eleventh Amendment immunity is simply wrong. By its decision today, the majority isolates itself not only from Justice Scalia's pronouncement, but also from every other court of appeals that has decided these issues.

I am convinced that the other circuits have correctly apprehended and applied the law. In my view (and I am far from alone), the district court's decision should be reversed, and this case should be remanded for further proceedings.

I.

Five of our sister circuits have meticulously reviewed the issues raised in this action and reached sound conclusions in deciding them. The Fifth, the Seventh, the Eighth, and the Tenth Circuits have each held that district courts possess jurisdiction to review the decisions of State commissions in enforcing—rather than merely accepting or rejecting—interconnection agreements. *See Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc.*, 235 F.3d 493, 496-97 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect*

Communications Corp., 225 F.3d 942, 947 (8th Cir. 2000); *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337-38 (7th Cir. 2000), *cert. denied sub nom. Public Serv. Comm'n v. Wisconsin Bell, Inc.*, 121 S. Ct. 896 (2001); *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000).

Moreover, the Fifth, the Seventh, and the Tenth Circuits have each held that a state waives Eleventh Amendment immunity by electing to participate in the regulation of local telephone service pursuant to the Act. *See AT&T Communications v. BellSouth Telecomms., Inc.*, No. 99-30421, 2001 WL 38281, at *10 (5th Cir. Jan. 16, 2001); *Illinois Bell*, 222 F.3d at 342; *MCI Telecomms. Corp. v. Public Serv. Comm'n*, 216 F.3d 929, 938-39 (10th Cir. 2000). These courts have also held that actions may be brought in the district courts, pursuant to *Ex parte Young*, 209 U.S. 123 (1908), to compel individual commissioners to cease ongoing violations of federal law. *See AT&T Communications*, 2001 WL 38281, at *11; *Illinois Bell*, 222 F.3d at 345; *Public Serv. Comm'n*, 216 F.3d at 939. Earlier, in *Michigan Bell Telephone Co. v. Climax Telephone Co.*, 202 F.3d 862, 867 (6th Cir.), *cert. denied sub nom. Strand v. Michigan Bell Telephone*, 121 S. Ct. 54 (2000), the Sixth Circuit provided a model that the Fifth, Seventh, and Tenth Circuits followed with regard to the *Ex parte Young* issue.[1] I find these deci-

[1] District courts, too, have recognized that the federal courts possess jurisdiction to review the enforcement decisions of State commissions. *See, e.g., Michigan Bell Tel. Co. v. Climax Tel. Co.*, 121 F. Supp. 2d 1104, 1114-15 (W.D. Mich. 2000); *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs.*, 97 F. Supp. 2d 1363, 1369 (N.D. Ga. 2000). Still more district courts have held that a state waives the Eleventh Amendment defense by participating in the regulation of interconnection agreements. *See, e.g., Bell Atlantic-Pa., Inc. v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653, 660-62 (E.D. Pa. 2000); *Bell Atlantic-Del., Inc. v. McMahon*, 80 F. Supp. 2d 218, 233 (D. Del. 2000); *Bell Atlantic-Del., Inc. v. Global Naps S., Inc.*, 77 F. Supp. 2d 492, 500 (D. Del. 1999); *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932, 946-47 (W.D. Mo. 1999), *rev'd*

sions highly persuasive in addressing the jurisdictional and immunity issues advanced in this proceeding.

II.

A.

My first major area of disagreement with the majority concerns whether federal courts possess subject matter jurisdiction to review decisions of State commissions in enforcing interconnection agreements.[2] The majority is incorrect in its conclusion that the Act, specifically 47 U.S.C. § 252(e)(6),[3] limits federal court

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in part & vacated in part on other grounds sub nom. Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm'n, Nos. 99-3833 & 99-3908, 2001 WL 13289 (8th Cir. Jan. 8, 2001). Many of these same courts have concluded that the *Ex parte Young* exception allows actions against individual commissioners to end ongoing violations of federal law. *See Bell Atlantic-Pa.*, 107 F. Supp. 2d at 662-64; *McMahon*, 80 F. Supp. 2d at 233-34; *Global Naps S.*, 77 F. Supp. 2d at 500-01; *AT&T Communications*, 86 F. Supp. 2d at 947-48.

It appears that only one district court—not yet overruled—agrees with the majority's position on the Eleventh Amendment issues. *See BellSouth Telecomms.*, 97 F. Supp. 2d at 1373 (holding that the Eleventh Amendment bars action pursuant to the Act against the State commission and its individual members). The Sixth Circuit has suggested, but has not definitively concluded, that the constructive waiver doctrine is inapplicable in cases under the Act. *See GTE N., Inc. v. Strand*, 209 F.3d 909, 922 n.6 (6th Cir.), *cert. denied sub nom. Strand v. Verizon N. Inc.*, 121 S. Ct. 380 (2000).

[2] Curiously, the majority addresses this threshold question only after unnecessarily reaching the merits of the claims of Eleventh Amendment immunity. Because the majority ultimately holds that this entire action is barred on jurisdictional grounds, it should not have considered the constitutional issue. *See Hoffman v. Hunt*, 126 F.3d 575, 582 (4th Cir. 1997) ("[W]e need not reach the constitutional question if there exists an alternative, nonconstitutional basis for our decision.") (citing *Peters v. Hobby*, 349 U.S. 331, 338 (1955)).

[3] The critical statutory provision here, § 252(e)(6) of the Act, provides as follows:

> In any case in which a State commission makes a determination under this section [252], any party aggrieved by such determination may bring an action in an appropriate Federal district

review to only those State commission determinations in which an interconnection agreement is initially approved or rejected, and disallows federal court review of determinations regarding the interpretation and enforcement of an existing agreement. Along with the circuits that have considered the jurisdictional issue, I "do not think so narrow a construction [of § 252] was intended." *Southwestern Bell*, 208 F.3d at 479; *accord Brooks Fiber Communications*, 235 F.3d at 497; *Connect Communications*, 225 F.3d at 947; *Illinois Bell*, 222 F.3d at 337-38; *see also Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd.*, 189 F.3d 1, 10 (1st Cir. 1999) (assuming, without deciding, that federal courts possess jurisdiction under § 252(e)(6) to review State commission determinations interpreting and enforcing existing agreements).

1.

Subsection 252(e)(6) expressly confers jurisdiction on the federal courts to review determinations made by State commissions pursuant to § 252. Thus, the critical question is whether the Commission's power to enforce the interconnection agreement here arises under § 252. The answer is that it does—that is, the power granted to states under § 252 to approve or reject interconnection agreements, be they negotiated or arbitrated, "necessarily includes the power to enforce the interconnection agreement." *Connect Communications*, 225 F.3d at 946 (citing *Southwestern Bell*, 208 F.3d at 479-80 (internal citations omitted)); *see also Illinois Bell*, 222 F.3d at 338. Importantly, this is also the view of the FCC. *See Starpower Communications, LLC*, 15 F.C.C.R. 11,277, at ¶ 6 (2000).[4] And we must defer to

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> court to determine whether the agreement or statement meets the requirements of section 251 of this title [47] and this section [252].

[4] In *Starpower Communications*, the FCC ruled that the Virginia State Corporation Commission failed to carry out its responsibility under § 252 by declining jurisdiction to enforce an existing interconnection agreement. *See Starpower Communications*, 15 F.C.C.R.

the ruling of the FCC because it is a reasonable interpretation of the statute. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Brooks Fiber Communications*, 235 F.3d at 497; *Connect Communications*, 225 F.3d at 946.

In summary, § 252 empowers State commissions to interpret and enforce existing agreements, and thus § 252(e)(6) expressly confers jurisdiction on the federal courts to review the states' enforcement determinations. Because the Act contains this express grant of federal jurisdiction, the majority's conclusion—that the Maryland courts possess default jurisdiction pursuant to state law and remnants of the original 1934 Act —cannot withstand scrutiny.

2.

A related issue presented here is whether the Commission's enforcement decision regarding reciprocal compensation for calls to Internet Service Providers ("ISPs") presents a question of the interconnection agreement's compliance with the requirements of §§ 251 and 252. The answer, again, is that it does—that is, "§ 252(e)(6)'s grant of jurisdiction to the federal courts to review for compliance with §§ 251 and 252 includes the power to ensure that the state commission's enforcement actions are consistent with federal law." *Connect Communications*, 225 F.3d at 948. This is true because, rather than limiting State

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11,277, at ¶¶ 6-7. Specifically, the FCC determined that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under section 252." Id. at ¶ 6. Yet, as if the context in which the underlying conclusion was reached somehow undermines its import, the majority disregards the FCC ruling by endeavoring to distinguish the situation in *Starpower Communications*, where a State commission fails to act, from the scenario here, where a commission does act but a party seeks review of its determination in federal court. I am unpersuaded by the majority's unsubstantiated and illogical pronouncement that the FCC ruling "does not bear on this case." *See ante*, at [39a] n.6.

commission scrutiny to a few narrow technical points, § 252 permits examination of broad factors including "the public interest, convenience, and necessity." *Id.* (quoting § 252(e)(2)(A)(ii)). Certainly, these considerations include compliance with federal law. *See id.* Here, the complaint filed by Bell Atlantic Maryland, Inc., ("Bell Atlantic") alleges that the Commission violated federal law in two ways: (1) by failing to apply FCC decisions ruling that Internet calls are not local to the interconnection agreement at issue, and (2) by erroneously holding that the FCC required the commission to impose reciprocal compensation for Internet calls. These allegations, coupled with the evolving opinions pertaining to ISP-bound traffic from the FCC and the courts, bespeak the questions of federal law underlying this action. *See id.* at 947-48.

3.

Obviously, this proceeding may also raise issues of state contract law; for example, the Commission attempted to ascertain the intention of the parties to the interconnection agreement. Because the district courts possess jurisdiction to review State commission determinations under § 252, and because those determinations may include issues of state law, the district courts may properly consider any related state law issues. *See Brooks Fiber Communications*, 235 F.3d at 498; *Southwestern Bell*, 208 F.3d at 482. This appraisal is limited, however, by the standards of review that we have already adopted. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999) (designating de novo standard for review of State commission interpretations of the Act, and substantial evidence standard for all other determinations).

B.

Unfortunately, by its holding that federal court jurisdiction is limited to reviewing the approval and rejection of interconnection agreements by State

commissions, the majority will create a confusing and unworkable scheme of federal and state review that is bound to produce absurd results. First, as the Tenth Circuit explained:

> A rule that restricted a district court's jurisdiction to review of a state commission's approval or rejection of an interconnection agreement would lead to results that Congress could not have intended. Under such a rule, certain state commission decisions would escape federal review simply because the dispute arose after the agreement had been approved.

Brooks Fiber Communications, 235 F.3d at 497. Second, the majority's holding—if imprudently followed across the country—could result in fifty states reaching fifty different conclusions about the interpretation of an important federal statute. And, finally, the majority's position undermines, and renders entirely meaningless, the recent explicit statement of Justice Scalia that "there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. For these reasons, I strongly disagree with the majority's conclusion that the Act confers only the narrowest jurisdiction on federal courts.[5]

III.

My next major area of disagreement with the majority relates to whether a federal proceeding against the Commission and its individual members is constitutionally barred. As the majority recognizes, the

[5] Because jurisdiction is provided in the district courts by § 252(e)(6), it is unnecessary for us to reach the argument that 28 U.S.C. § 1331 confers general federal question jurisdiction. I note, however, that contrary to the assertion of the majority, *see ante*, at [50a], the *Rooker-Feldman* doctrine has no application here.

sovereign immunity accorded states under the Eleventh Amendment is not absolute. Specifically, there is no sovereign immunity defense available where one of three exceptions applies: (1) Congress, while acting pursuant to its powers under the Fourteenth Amendment, has properly abrogated a state's immunity, *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996); (2) a state has waived its immunity by consenting to suit in federal court, *see College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); or (3) a private party sues an appropriate state officer for prospective injunctive or declaratory relief from an ongoing violation of federal law, *see Ex parte Young*, 209 U.S. at 159-60. The first of these three exceptions, the abrogation exception, has no application here.[6] However, both the waiver exception and the *Ex parte Young* exception do apply.

A.

First of all, it is elementary that a state may waive its Eleventh Amendment immunity, either explicitly or constructively. Although the Supreme Court has significantly limited the constructive waiver doctrine, even the majority acknowledges that a state still "may implicitly waive its sovereign immunity by accepting from Congress a 'gift' or a 'gratuity,' the receipt of which is made conditional on the State's waiver of immunity." *Ante*, at [17a] (citing *College Sav. Bank*, 527 U.S. at 686-87 (internal citations omitted)). I agree with the view of the Fifth, Seventh, and Tenth Circuits that, with respect to the Act, a state waives the defense of sovereign immunity by electing to participate in the regulation of interconnection agreements. *See AT&T Communications*, 2001 WL 38281, at *10; *Illinois Bell*, 222 F.3d at 342; *Public Serv. Comm'n*, 216 F.3d at

[6] The abrogation exception does not apply because, in passing the Act, Congress acted pursuant to its powers under Article I of the Constitution, rather than the Fourteenth Amendment. *See, e.g., Illinois Bell*, 222 F.3d at 338 (citing 47 U.S.C. § 151).

938-39. This position does not require "heroic assumptions," as asserted by the majority, but simply requires adherence to a plain reading of the Act.

1.

The first inquiry we must make is simple—whether Congress, with sufficient clarity, invited the states to waive their Eleventh Amendment immunity. *See Illinois Bell*, 222 F.3d at 340; *see also Abril v. Virginia*, 145 F.3d 182, 189 n.13 (4th Cir. 1998) (holding that Congress cannot elicit a constructive waiver of Eleventh Amendment immunity from a state without "having plainly stated its intention that participation by a State in the regulated activity would be deemed an implied waiver of immunity") (citation omitted). Under 47 U.S.C. § 252, the states are given the choice of participating in the federal government's regulation of local telephone service. If a state does not choose to participate, the FCC acts in its place. *See* § 252(e)(5). If, on the other hand, a state does choose to participate, its role in the mediation, arbitration, and review process for interconnection agreements is defined and controlled by § 252. Moreover, if a state chooses to participate, its determinations are subject to review by the federal courts. *See* § 252(e)(6) ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section."); *see also* § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.").

Although not as blunt as the example singled out by the majority as providing adequate notice of a waiver

requirement,[7] these Act provisions clearly show Congress's intent to subject participating states to suits in federal court. *See Public Serv. Comm'n*, 216 F.3d at 938 ("[Section] 252 puts Utah on notice that Congress intends to subject it to suits brought by individuals if it acts under § 252."); *Illinois Bell*, 222 F.3d at 341 (finding that the structure of § 252 "makes clear that Congress intended to provide for federal court review of any regulatory determination made under the section, whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place"); *see also Bell Atlantic-Pa., Inc. v. Pennsylvania Public Util. Comm'n*, 107 F. Supp. 2d 653, 661 (E.D. Pa. 2000) (holding that "although the [Act] does not contain explicit waiver language, the structure of the statute clearly expresses Congress'[s] intent that 'states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court'" (quoting *Illinois Bell*, 222 F.3d at 341)).

2.

According to the majority, when a State commission elects to make § 252 determinations, it merely consents to review of its decisions in federal court, rather than being made a party to the review proceeding. The majority maintains that it requires "a leap of logic" to infer consent to be made a party from consent to federal court review. In my view, no such "leap of logic" is either necessary or compelled, because consent to federal court review necessarily entails being made a

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[7] The majority relies on *Litman v. George Mason University*, 186 F.3d 544, 554 (4th Cir. 1999), a decision involving the Rehabilitation Act, which "states outright that a State 'shall not be immune under the Ele-venth Amendment . . . from suit in Federal court' for a violation of the act's anti-discrimination edict." *Ante*, at [18a-19a] (citation omitted). Although this provision is useful in its explicitness, such precise lan-guage is not required as long as Congress's intent to require waiver is clear.

party to the action. The Seventh Circuit has held that when the provisions of the Act are read as a whole, it is obvious that the Act permits suits against State commissions in federal court, not just federal review of the interconnection agreements themselves. *See Illinois Bell*, 222 F.3d at 337. As that court explained:

> At the outset, we note that the subsection providing for judicial review is titled "Review of State commission actions," not "Review of interconnection agreements," thus signaling that Congress intended that the state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions. Moreover, subsection 252(e)(4), when read in conjunction with subsection 252(e)(6), provides additional evidence that Congress contemplated suits against state defendants in federal court. Subsection 252(e)(4) provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." This language indicates that Congress envisioned suits reviewing actions by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court.

Id. (internal citation omitted); *see also Michigan Bell*, 202 F.3d at 868.

Indeed, by allowing State commissions to substitute as regulators for the FCC, Congress obviously intended that State commissions, just like the FCC, be made parties to federal court actions challenging their decisions. In fact, as the majority notes, even Maryland recognizes that the Commission may necessarily be made a party to an appeal of its own decision. *See* Md. Code Ann., Pub. Util. Cos. § 3-204(d). As the Sixth Circuit expounded:

> It is the PSC's duty, if it chooses to regulate, not[that of the other party to the agreement], to ensure that the agreement meets the requirements of the Act both at the time of arbitration, 47 U.S.C. § 252(c), and at the time of approval, 47 U.S.C. § 252(e)(2)(B). Furthermore, it is the PSC's function, not the other party's, to enforce the agreement. Lacking power to enjoin the PSC from enforcing the approved agreement, federal courts would have little effective remedy for aggrieved plaintiffs, or would subject companies to the intolerable prospect of conflicting commands from federal courts and state regulatory agencies.

Michigan Bell, 202 F.3d at 868. Such irreconcilable holdings among state and federal courts would undermine Congress's regulatory scheme. Thus, State commissions must be available as parties for federal court review of their determinations. Any other notion would again undermine Justice Scalia's observation that State commissions acting in defiance of federal policy may be "brought to heel" by the federal courts. *See Iowa Utils. Bd.*, 525 U.S. at 379 n.6.

3.

Because Congress clearly invited the states to participate in the regulation of interconnection agreements in exchange for waiver of their Eleventh Amendment immunity, our next inquiry is whether a state, by accepting the invitation to participate, unequivocally agrees to waive its immunity. *See Illinois Bell*, 222 F.3d at 342 ("As the Supreme Court has noted, there is a 'fundamental difference' between 'Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived [its] immunity' and 'a State's expressing unequivocally that it waives its immunity.'" (quoting *College Sav. Bank*, 527 U.S. at 680-81). In order to be valid, a waiver must be "conditioned on the state's truly voluntary acceptance of a federal 'gratuity.'" *Id.*; *see also Public Serv.*

Comm'n, 216 F.3d at 937.[8] A waiver is coerced—not voluntary—"when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity." *College Sav. Bank*, 527 U.S. at 687.

Thus, we must determine whether a state's participation in the regulation of local telephone service is, on the one hand, a "gratuity" bestowed by Congress or, on the other hand, an "otherwise lawful activity" which the states may conduct without federal consent. Prior to 1996, the states regulated phone services within their own borders; however, the Act "unquestionably" took away regulation of local telecommunications competition from the states with regard to matters addressed by the Act. *See Iowa Utils. Bd.*, 525 U.S. at 379 n.6; *see also id.* at 402-05 (Thomas, J., concurring in part & dissenting in part) (recounting the pre-Act history of federal and local telecommunications regulation). The Act now may invite the states to participate in the regulation of interconnection agreements, but it is of utmost significance that "[a]lthough it did not do so, Congress could have preempted *all* state regulation of local phone service." *Public Serv. Comm'n*, 216 F.3d at 938 (citing *FERC v. Mississippi*, 456 U.S. 742, 764 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-91 (1981)) (emphasis added); *see also Illinois Bell*, 222 F.3d at 342; *Bell Atlantic-Pa.*, 107 F. Supp. 2d at 661.

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[8] In this context, Congress bestows a "gratuity" when it offers to do something it otherwise has no obligation to do. For example: "Under the Compact Clause, . . . States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity. So also, Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts." *College Sav. Bank*, 527 U.S. at 686-87 (referring to two decisions allowing Congress to extract constructive waivers of state sovereign immunity: *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) and *South Dakota v. Dole*, 483 U.S. 203 (1987)).

Because the states may not regulate local telecommunications in defiance of the Act, their participation in the regulation of interconnection agreements is a gratuity bestowed by Congress; it is clearly not an activity in which the states may lawfully engage on their own terms. As the Tenth Circuit recently explained:

> [W]ith the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity. . . . Congress was under no obligation to allow states to participate in the Act's regulatory scheme. Accordingly, by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity.

Public Serv. Comm'n, 216 F.3d at 938; *see also Illinois Bell*, 222 F.3d at 343. The majority comments:

> The district court noted that the Act "stripped the states of local power to regulate telecommunications that had been vested in them for decades," and remarked, "Some gift." *Cf.* Virgil, *Aeneid*, bk. II, l. 49 ("Whatever it is, I fear Greeks even when they bear gifts" (reporting the comments of the Trojan priest Laocoon upon seeing the large wooden horse left by the Greeks as a "gift" to the city of Troy)).

Ante, at [19a] n.3. This analogy is inapposite, however, because we are dealing with a horse of a different color. The mere happenstance that the states once reserved the power to regulate intrastate telephone service does not, as the majority suggests, diminish the gratuity status of the states' option to participate in regulation under the Act. Nor is this gratuity filled with hidden danger for any unwary recipient.

Because the waiver here was conditioned upon acceptance of a gratuity, the majority further errs in drawing parallels between this scenario and that in *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184 (1964), *overruled by College Sav. Bank*, 527 U.S. at 680. In *Parden*, the State of Alabama exercised its sovereign authority to operate a railroad; that is, the state engaged in an "otherwise lawful activity" that may have been regulated by Congress, but required no federal consent for the state to participate. On the other hand, in the scenario presented here, "[u]nlike the situation in *Parden* . . . , the states are not merely acting in an area regulated by Congress; they are now voluntarily *regulating on behalf of Congress*." *Illinois Bell*, 222 F.3d at 343 (emphasis in original). In *Parden*, the State of Alabama acted on its sovereign authority; here, the State of Maryland acted pursuant to a gratuitous grant of authority from Congress. *See Illinois Bell*, 222 F.3d at 343; *see also Bell Atlantic-Del., Inc. v. Global Naps S., Inc.*, 77 F. Supp. 2d 492, 500 (D. Del. 1999) ("Because the PSC was not exercising its sovereign authority in its arbitration of the interconnection agreement . . . , it is not entitled to sovereign immunity for its acts.").

The situation presented here instead parallels those in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959) (upholding a waiver requirement where states received a gratuity from Congress—approval of an interstate compact pursuant to the Compact Clause), and *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that Congress could impose conditions on a state's acceptance of federal funds allocated under the Spending Power). The type of waiver required by Congress in *Petty* and in *Dole*—one conditioned on receipt of a gift or gratuity—has been endorsed by the Supreme Court. *See College Sav. Bank*, 527 U.S. at 686. And, contrary to the assertions of the majority, that is exactly the type of waiver at issue here. It must be concluded, therefore, that Congress extended the Commission a clear invitation to participate in the

regulation of interconnection agreements in exchange for the waiver of its Eleventh Amendment immunity, and the State of Maryland unequivocally agreed to waive its immunity by choosing to accept this gratuity from Congress.

B.

Even if Maryland had not waived its Eleventh Amendment immunity, the individual members of the Commission still may be sued in their individual capacities, pursuant to *Ex parte Young*, for prospective injunctive relief. 209 U.S. at 155-56 (finding exception to general rule of state sovereign immunity where there are suits against state officials for equitable relief to end ongoing violations of federal constitutional rights); *see also Alden v. Maine*, 527 U.S. 706, 748 (1999) (affirming the vitality of *Ex parte Young* despite reaffirming states' general protections from suit); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997) (recognizing that the *Ex parte Young* doctrine extends to violations of federal law). Contrary to the position of the majority, and in accordance with the other circuits that have considered the issue, this dispute presents "a straightforward *Ex parte Young* case." *Michigan Bell*, 202 F.3d at 867; *accord AT&T Communications*, 2001 WL 38281, at *11; *Public Serv. Comm'n*, 216 F.3d at 939-40; *Illinois Bell*, 222 F.3d at 345; *see also Bell Atlantic-Pa.*, 107 F. Supp. 2d at 663; *Global Naps S.*, 77 F. Supp. 2d at 500.[9]

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[9] The majority suggests that "it is more likely that State-contract-law, rather than federal-law, violations would be redressed" in Bell Atlantic's action against the individual commissioners, and thus the *Ex parte Young* exception does not apply here. *Ante*, at [25a-28a, 29a]. However, because we are reviewing the district court's grant of a motion to dismiss, we review the sufficiency of the complaint de novo. *See Al-Abood v. El-Shamari*, 217 F.3d 225, 233 (4th Cir. 2000). In its complaint, Bell Atlantic alleges that the Commission violated the Act by failing to apply—and by misinterpreting—the FCC ruling regarding ISP-bound traffic. Because the complaint states a claim for equitable relief from an ongoing violation of federal law, the complaint against the

1.

The majority inaptly notes that Congress authorized actions against State commissions, as distinct from individual commissioners. The majority comments that "[n]owhere under the State public utilities law is regulatory power conferred upon an individual commissioner and nowhere is an individual commissioner made subject to suit for the Public Service Commission's regulatory actions." *Ante*, at [22a] n.4. In my view, this point simply misses the essence of *Ex parte Young*: when state officials act in violation of federal law, their acts are stripped of state authority and they have no claim to any protection that might otherwise be provided by the Eleventh Amendment. That is, when

> [t]he act to be enforced is alleged to be unconstitutional [or violative of federal statute] . . . the use of the name of the state to enforce [such] act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting to use the name of the State to enforce a legislative enactment which is void because unconstitutional [or violative of federal statute].

Ex parte Young, 209 U.S. at 159. The Supreme Court's distinction between a state and its officers—albeit a distinction that can be described as "an obvious fiction," *Coeur d'Alene Tribe*, 521 U.S. at 270—means that Congress need not, as the majority seems to suggest, explicitly authorize actions against individual commissioners.

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individual commissioners is entirely sufficient to survive a motion to dismiss. *See Michigan Bell*, 202 F.3d at 867.

2.

In refusing to apply the *Ex parte Young* exception to the proceeding, the majority also advances faulty arguments that: (1) there is no federal interest that would be served by a suit against the individual members of the Commission, particularly inasmuch as such a suit would alter any remedial scheme established in the Act for enforcement of federal law, *see Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996); and (2) such a federal court action would unduly sacrifice Maryland's sovereign immunity, *see Coeur d'Alene Tribe*, 521 U.S. at 269-70. Contrary to the majority's position, the other circuits that have considered the issue have concluded that neither *Seminole Tribe* nor *Coeur d'Alene Tribe* renders *Ex parte Young* inapplicable. *See Illinois Bell*, 222 F.3d at 345-48; *Public Serv. Comm'n*, 216 F.3d at 940 n.8; *Michigan Bell*, 202 F.3d at 867-68.

A major difficulty undercutting the majority's position is that, unlike the Indian Gaming Regulatory Act ("IGRA") at issue in *Seminole Tribe*, the Telecommunications Act "does not impose an elaborate remedial scheme upon a reviewing court; in fact, the statute fails to specify any particular relief." *Bell Atlantic-Pa.*, 107 F. Supp. 2d at 664 (citations omitted). As the Delaware district court explained:

> In [*Seminole Tribe*], the Court noted that the federal law at issue provides for a series of limited remedies against a noncomplying State, none of which amount to a direct suit against the State. Noting that the application of *Young* would provide a stricter remedy tha[n] those contemplated by statute and would render the other remedies superfluous, the Court disallowed suit against the State under *Young*.
>
> In the present case, by contrast, the remedy provided for by statute and the remedy under *Young* are one and the same. Under § 252(e)(6), a federal court will review the PSC's ruling to see if it

> comports with federal law. Under *Young*, a federal court will review the ruling of the PSC's commissioners to determine if they properly applied federal law. There is no substantive difference between these two actions, and so *Seminole Tribe* does not bar suit against the PSC under the doctrine of *Ex parte Young*.

Global Naps S., 77 F. Supp. 2d at 501; *see also Illinois Bell*, 222 F.3d at 345-47 (parsing the detailed remedial scheme at issue in *Seminole Tribe* and rejecting a purported analogy between it and the Telecommunications Act's enforcement scheme, where "Congress has not limited the court's remedial power").

Instead of endorsing these adept analyses, the majority simply asserts that "a federal court action against State commissioners of this type would improperly expand the federal remedy selected by Congress." *Ante*, at [29a]. In so concluding, the majority builds error upon error by relying on its assertion that federal courts lack jurisdiction to review State commission decisions enforcing existing interconnection agreements. According to the majority:

> Section 252(e)(6) invokes federal court review only for State commission determinations made under § 252 to determine whether interconnection agreements are in compliance with §§ 251 and 252. If, however, we were to permit an *Ex parte Young* action to proceed against State officers, presumably to answer to a federal court injunction and potentially to face sanctions for non-compliance with that injunction, we would be supplementing the narrowly defined federal court review selected by Congress [in violation of *Seminole Tribe*].

Ante, at [28a-29a]. Even if the majority were correct about the jurisdiction issue—although it is not, *see supra* Part II—its failure to apply the *Ex parte Young* exception ignores that, even under its view, "section 252 only limits a district court's scope of review, it does

not render the [Act] vulnerable to *Seminole Tribe*'s remedial scheme limitation." *Bell Atlantic-Pa.*, 107 F. Supp. 2d at 664.

Another serious defect in the majority's stance is that Maryland's interest in the regulation of local telecommunications cannot be equated with the "special sovereignty interest" at issue in *Coeur d'Alene Tribe*—Idaho's fundamental interest in its own land. *See Illinois Bell*, 222 F.3d at 347-48. As the Seventh Circuit explained:

> In the wake of the 1996 Telecommunications Act, any "sovereign" interest Illinois and Wisconsin may have in regulating interconnection agreements . . . is derived solely from the regulatory role Congress has bestowed upon the states. Thus, the suits against the state commissioners to require compliance with the [Act] do not strike at core functions or fundamental powers of either Illinois or Wisconsin. Therefore, the availability of an *Ex parte Young* suit in our cases is not affected by the special limitation recognized by a majority of the Court in *Coeur d'Alene Tribe*.

Illinois Bell, 222 F.3d at 348 (footnote and citation omitted). Since there are no "special sovereignty interests" implicated by applying the *Ex parte Young* exception here—and since there are no other valid reasons not to apply the exception—I strongly believe that Bell Atlantic should be allowed to proceed in its action against the members of the Commission in their individual capacities.

IV.

In my opinion, the majority errs on the major points. First, the Telecommunications Act plainly confers federal court jurisdiction for review of enforcement determinations of the Commission. Secondly, the State of Maryland waived its defense of Eleventh Amendment immunity by freely electing to participate in the

regulation of local telecommunications pursuant to the Act. Lastly, the individual members of the Commission may be sued in their official capacities under *Ex parte Young* to cease ongoing violations of federal law. Because the majority holds to the contrary, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. S 99-2061

BELL ATLANTIC-MARYLAND, INC.,

Plaintiff,

v.

MFS INTELENET OF MARYLAND, INC.; AMERICAN COMMUNICATIONS SERVICES OF MARYLAND, INC.; RCN TELECOM SERVICES OF MARYLAND INC.; STARPOWER COMMUNICATIONS, LLC; TCG-MARYLAND; MCIMETRO ACCESS TRANSMISSION SERVICES, LLC; THE PUBLIC SERVICE COMMISSION OF MARYLAND; GLENN F. IVEY, Commissioner; CLAUDE M. LIGON, Commissioner; E. MASON HENDRICKSON; Commissioner; SUSANNE BROGAN, Commissioner; CATHERINE I. RILEY, Commissioner,

Defendants.

[Decided Oct. 20, 1999]

Before FREDERIC N. SMALKIN, United States District Judge.

MEMORANDUM OPINION

Bell Atlantic-Maryland, Inc. ("Bell Atlantic") filed a two-Count complaint against the defendants alleging that The Public Service Commission of Maryland ("the PSC") violated the Telecommunications Act of 1996. More specifically, Bell Atlantic claims that the PSC's Order No. 75280 issued June 11, 1999 ("the Order") is in direct conflict with a declaratory ruling issued

February 26, 1999 by the Federal Communications Commission ("FCC").

Now before the Court is the motion to dismiss of the PSC, and its commissioners, Ivey, Ligon, Hendrickson, Brogan and Riley (collectively, "the Commissioners"). Bell Atlantic has filed an opposition to the motion, and defendants MFS Intelenet of Maryland, Inc., MCI METRO Access Transmission Services LLC and TCG Maryland, Inc. have filed a joint opposition to the motion to dismiss. The United States of America has intervened in this case, and has filed an opposition to the motion to dismiss as well, asking the Court to uphold the constitutionality of the judicial review provisions of the Telecommunications Act of 1996. No oral hearing is necessary. *See* Local Rule 105.6 (D. Md.). For the reasons set forth below, the motion to dismiss will be GRANTED.

I. BACKGROUND

The Telecommunications Act of 1996 ("the 1996 Act") was enacted to promote competition in local telecommunications markets. Among their duties under § 251 of the 1996 Act, incumbent local exchange carriers such as Bell Atlantic must allow competing carriers to interconnect their facilities with the incumbent's network, and establish reciprocal compensation arrangements for the transport and termination of telecommunications.[1] 47 U.S.C. § 251(a) and (b). To fulfill their § 251 duties, the incumbents must negotiate in good faith with competing carriers terms and conditions of voluntary interconnection agreements. § 251(c)(1) and § 252(a). If these private negotiations fail, either party may petition the state commission to arbitrate open

[1] Reciprocal compensation works as follows: When a customer of Carrier A places a call to a customer of Carrier B in the same local area, Carrier A pays Carrier B for "terminating," or completing, that local call. Similarly, when a customer of Carrier B calls a customer of Carrier A within that same local area, Carrier B pays termination charges to Carrier A. *See* Pl.'s Opp'n at 8.

issues. § 252(b). Once a negotiated or arbitrated interconnection agreement is in place, the parties must submit it to the state commission for approval or rejection. § 252(e)(1). A state commission may reject an agreement adopted by negotiation only if the agreement "discriminates against a telecommunications carrier not a party to the agreement," or if "implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity." § 252(e)(2)(A). A party aggrieved by a state commission's determination under § 252 may seek review in a federal district court "to determine whether the agreement or statement meets the requirements of section 251 [and section 252]." § 252(e)(6).

Bell Atlantic entered into a voluntarily-negotiated interconnection agreement with MFS Intelenet of Maryland, Inc. ("MFS") on July 16, 1996, and the PSC approved that agreement on October 9, 1996. The other private defendants entered voluntary agreements in relevant part identical to the MFS agreement. Several months after the agreement was signed and approved, a disagreement arose over the interpretation of a provision regarding payment of reciprocal compensation that the parties had previously negotiated and agreed upon. That provision requires Bell Atlantic to pay reciprocal compensation for "local" calls. The parties disagree on whether calls to internet service providers (who then connect the callers to the internet) are "local."

In Count I, Bell Atlantic asserts that the PSC's conclusion in the Order—that under the agreements internet calls are local—is in direct conflict with the February 26, 1999, FCC declaratory ruling. In Bell Atlantic's view, the FCC ruling unequivocally held that calls connected to the internet are "interstate" calls, not local calls.

In Count II, Bell Atlantic asserts that the PSC erroneously interpreted the FCC declaratory ruling as *requiring* state commissions to impose reciprocal

compensation for internet calls where parties cannot agree on rules governing compensation for such traffic.[2] According to Bell Atlantic, as a result of that error, the PSC in the Order determined that carriers without current interconnection agreements would be required to pay reciprocal compensation rates for internet-bound calls on a temporary basis, until the FCC creates an inter-carrier compensation mechanism for such calls.

Bell Atlantic requests the following specific relief: that this Court issue an order (1) declaring the PSC's decision unlawful, (2) enjoining all defendants, and all parties acting in concert therewith, from seeking to enforce that unlawful decision against Bell Atlantic, (3) requiring the PSC and Commissioners to order defendant carriers to refund money obtained from Bell Atlantic in reciprocal compensation fees for internet traffic. Compl., at 13-14.

The PSC and Commissioners argue that Bell Atlantic's entire suit against them is barred by the Eleventh Amendment.[3] The opponents to the motion to dismiss argue that two exceptions to the Eleventh Amendment apply in this case: (1) constructive waiver, and (2) the case law doctrine established under *Ex parte Young*, 209 U.S. 123 (1908).[4] Additionally, the PSC

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[2] Although Bell Atlantic concedes that the declaratory ruling permits the PSC to require reciprocal compensation for internet calls, it contests the correctness of that ruling. That ruling has been challenged on appeal to the D.C. Circuit. *See* Pl.'s Mot. for Summ. J. at 21 n.9.

[3] Because the Court agrees with the PSC's Eleventh Amendment argument, it need not address the alternative argument of the PSC and Commissioners that this Court has no jurisdiction to review decisions of the PSC *enforcing* (as opposed to approving or rejecting) previously-approved interconnection agreements.

[4] Opponents to the motion to dismiss did not argue the third exception to the Eleventh Amendment, that Congress abrogated the states' Eleventh Amendment immunity in the 1996 Act. Likely the reason they did not so argue is because Congress does not have power under the commerce clause to abrogate the states' Eleventh Amendment immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73

and Commissioners argue that Count II is not ripe for review; the opponents argue to the contrary.

II. DISCUSSION

A. *Eleventh Amendment*

The Eleventh Amendment protects an unconsenting state from suit in federal court by private parties. *See Hans v. Louisiana*, 134 U.S. 1 (1890).[5] A state's Eleventh Amendment immunity extends to state agencies, such as the PSC, and state officials, such as the Commissioners. *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

1. *Constructive Waiver*

The Court rejects the argument that the PSC has constructively waived its Eleventh Amendment immunity by participating in the regulatory scheme of the 1996 Act.[6] The Supreme Court recently repudiated the doctrine of constructive waiver. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2230 (1999) ("constructive waiver is little more than abrogation under another name"). While some constructive waivers apparently survived *College Savings Bank*, Congress was permitted to extract those constructive waivers from the states only in a very limited context. *Id.* at 2231. When exercising

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(1996) ("The Eleventh Amendment restricts the Judicial Power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). Congress does have such power, however, when acting under section 5 of the Fourteenth Amendment. *Id.* at 59 (affirming *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

[5] The Eleventh Amendment withdraws jurisdiction from the federal court: "the judicial power of the United States shall not . . . extend to any suit in law or equity. . . ." U.S. Const. amend. XI. This withdrawal effectively confers immunity from federal suit on the states, but, of course, allows them to be sued in their own courts.

[6] There is no contention that the PSC has *expressly* waived its immunity.

its spending power (granting federal funds to states[7]) or otherwise bestowing a gift (granting approval of an interstate compact[8]) to states, Congress was permitted to condition receipt of that gift on a waiver of immunity. *See College Sav. Bank*, 119 S. Ct. at 2231; *see also Litman v. George Mason Univ.*, No. 98-1742, 1999 WL 547910 (4th Cir. July 28, 1999) (upholding constitutionality of Title IX's constructive waiver clause as valid exercise of Congress's spending power and noting Congress may condition federal grant on state's waiver of Eleventh Amendment immunity).

The opponents' attempt to characterize the new "federal cooperative" in telecommunications competition as a "gift" to states is unavailing. In the 1996 Act, Congress stripped the states of the local power to regulate telecommunications that had been vested in them for decades (as Congress was entitled to do under the Commerce Clause). Some gift. It is beyond this Court's imagination how Congress's offer to the states to participate as regulators in the very federal scheme that divested them of their local power can be considered a "gift," and it is certainly not one that the states could freely decline to accept.[9] *See Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wis.*, 57 F. Supp. 2d 710 (W.D. Wis. 1999) ("There is no arguable basis to a claim that equates a gift with a state's participation in the act's cooperative federalism."); *see also AT&T Communications v. BellSouth Telecommunications*, 43 F. Supp. 2d 593, 602 (M.D. La. 1999) ("Upon passage of the 1996 Act, the states were forced to either abide by

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[7] *See South Dakota v. Dole*, 483 U.S. 203 (1987).

[8] *See Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

[9] The Court agrees with the PSC that local telephone service is an area of traditional local concern to state commissions, and that the states have a strong interest in providing telecommunications services to citizens at competitive rates. So, when Congress moved into this area, it is doubtful that the PSC could have voluntarily declined the "gift."

the federal regulations or cede the power to regulate to the FCC—a classic Hobson's choice. The option of either consenting to federal regulation and waiving immunity or losing the previously held power to regulate a local exchange carrier is not a choice that this court sees as voluntary.").

In summary, in light of *College Savings Bank* and the Court's rejection of the argument that this case falls into the limited exception of waivers permitted post-*College Savings Bank*, the Court concludes that the PSC did not constructively waive its Eleventh Amendment immunity when it participated in the regulatory process under the 1996 Act.

2. *Ex parte Young*

Bell Atlantic next argues that it may bypass the Eleventh Amendment under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). That doctrine permits private individuals to sue state officers in federal court for prospective, injunctive relief for continuing violations of federal law. The Supreme Court, in essence, created a fiction in *Ex parte Young* to avoid the dictates of the Eleventh Amendment, for the purpose of vindicating the federal interest in assuring the supremacy of federal law. *See Green v. Mansour*, 474 U.S. 64, 68 (1985) ("the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause" but noting "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment").

Unfortunately for the lower courts, it is far from clear when *Ex parte Young* relief is available; it is no surprise, therefore, that courts have gone both ways on whether it is available to review state commission determinations under the 1996 Act. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (observing that the "difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many

instances be that between day and night"). Indeed, from the case law it appears in many instances to be the difference between 12:00 and 12:01, if that.

The only federal circuit court to address whether *Ex parte Young* is available under the 1996 Act is the Sixth Circuit, which concluded that a case against state commissioners under the 1996 Act is a "straightforward *Ex parte Young* case." *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 186 F.3d 726, 731 (6th Cir. 1999). In reaching its conclusion, the Sixth Circuit undertook no analysis of whether *Ex parte Young* was an appropriate remedy under the 1996 Act; instead, the court simply stated that "the Seventh Circuit properly concluded that [*Seminole Tribe* and *Coeur d'Alene Tribe*] did not affect the application of *Ex parte Young* to § 252 cases" and the court "adopted the reasoning of the Seventh Circuit." *Id.* at 731-32 (citing *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315, 321 (7th Cir. 1999)). But the trouble with going there (to the Seventh Circuit's reasoning), to quote Dorothy Parker (although not a legal scholar, a noted wit), "is that when you get there, there is no there, there." When one actually reads the Seventh Circuit's opinion in *MCI*, one discovers that it did not decide the *Ex parte Young* issue. *See MCI*, 168 F.3d at 323 n.3 ("Because we have decided that the state authorities waived their Eleventh Amendment immunity, we need not address whether the doctrine of *Ex parte Young* affords an alternate basis for holding that the Eleventh Amendment does not bar this action.").[10] Thus, this Court does not find the Sixth Circuit's decision of any worth on the issue of whether *Ex parte Young* relief is available under the 1999 Act.

In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), the Supreme Court restricted use of the

[10] The Seventh Circuit granted a rehearing on its constructive waiver holding in light of *College Sav. Bank. MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 183 F.3d 567 (1999).

doctrine of *Ex parte Young*, and ruling it out where a court can infer that Congress did not intend the federal court to provide traditional *Ex parte Young* injunctive relief. One way to infer whether Congress intended that such relief be available is to review the remedial scheme Congress provided. If Congress provided an alternative, specific form of relief to enforce compliance with a particular statute, especially a limited form of relief, it is likely that Congress did not intend *Ex parte Young* relief. *Seminole Tribe*, 517 U.S. at 74.

Here, the statute provides, "In any case in which a State commission makes a determination under [section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine *whether the agreement or statement [of generally available terms] meets the requirements of § 251 [and § 252]*." § 252(e)(6) (emphasis added). This review provision authorizes only limited review of determinations by state commissions to ensure that agreements or statements meet federal requirements, whereas an *Ex parte Young* action against individual commissioners, would expose them "to the full remedial powers of a federal court, including, presumably, contempt sanctions." *See Seminole Tribe*, 517 U.S. at 75. While the remedial scheme in the 1996 Act is not as intricate as the remedial scheme in the statute at issue in *Seminole Tribe*, it nevertheless specifically limits the scope of the federal court review available (and thus the relief the Court may provide), suggesting that Congress did not intend an *Ex parte Young* action against the Commissioners. *See Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) ("When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for [] violations that may occur in the course of its administration, we have not created additional . . . remedies." *See AT&T Communications*, 43 F. Supp. 2d at 602 ("The 1996 Act provides a remedial scheme which limits the type of judicial remedy available."); *Wisconsin Bell, Inc. v. Public Serv. Comm'n*, 27 F. Supp. 2d 1149,

1160 (W.D. Wis. 1998) ("Congress is a superior legislator to the courts and its choice of remedy must be respected.").

Another way to infer whether Congress wanted an *Ex parte Young* action to survive against the Commissioners[11] is to review the language that Congress used in the 1996 Act.[12] *See Seminole Tribe*, 517 U.S. at 75 n.17 (noting Congress's exclusive reference to "the State" in statute and contrasting statutes where Congress referred to individual state officials). Here Congress chose the words "State commission" in the judicial review provision,[13] and nowhere in § 251 or § 252 does Congress refer to individual state commissioners. The language that Congress selected militates against finding that Congress intended an *Ex parte Young* action to exist against individual state commissioners in the 1996 Act.

In all likelihood, Congress, writing the 1996 Act prior to the *Seminole Tribe* and *College Sav. Bank* decisions, intended to abrogate states' Eleventh Amendment immunity or to extract constructive waivers from the states; but it is now clear that Congress had no such power. *See Seminole Tribe*, 517 U.S. 44; *College*

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[11] It is perplexing to contemplate how Bell Atlantic can sue the two Commissioners who dissented from the Order (and, thus, presumably in Bell Atlantic's view are in compliance with federal law), or how Bell Atlantic can sue the one Commissioner who did not even participate in the Order (defendant Riley), having been appointed after the Order was issued. Making such individuals defendants is one of the absurdities associated with the *Ex parte Young* fiction.

[12] The judicial review provision, section 252(e)(6) titled "Review of State commission actions," provides in pertinent part:

> . . . In any case in which a State commission makes a determination under this section, any party aggrieved by such de-termination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

[13] By the PSC's count, § 252 alone refers to "state commission" 45 times. PSC Reply at 14.

Sav. Bank, 119 S. Ct. 2219. This Court is not empowered to redraft the statute. *See Seminole Tribe*, 517 U.S. at 76 (noting court is not "free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that [making the state suable in federal court] was beyond its authority").[14]

In short, this Court cannot recognize an implied cause of action against the Commissioners under *Ex parte Young*, because the Court infers from the 1996 Act that Congress did not authorize such federal jurisdiction. Instead, this Court decides the Eleventh Amendment issue in concurrence with the two published cases that have held that an *Ex parte Young* action against state commissioners is unavailable under the 1996 Act. *See Wisconsin Bell*, 57 F. Supp. 2d 710 (holding state commission entitled to Eleventh Amendment immunity and rejecting use of constructive waiver doctrine or *Ex parte Young* doctrine in context of 1996 Act); *AT&T Communications*, 43 F. Supp. 2d 593 (same).[15]

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[14] Whether Congress intended that *Ex parte Young* relief be available under the 1996 Act is one of many uncertain aspects of the 1996 Act (due to its poor draftsmanship). *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) (Scalia, J.) ("It would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.").

[15] The Court recognizes that other courts have concluded to the contrary. In addition to the Sixth Circuit case mentioned in the text, the following published cases have permitted *Ex parte Young* actions against state commissioners (only two of which discuss *Seminole Tribe*'s restriction of *Ex parte Young*): *Indiana Bell Tel. Co., Inc. v. McCarty*, 30 F. Supp. 2d 1100 (S.D. Ind. 1998); *Michigan Bell Tel. Co. v. MFS Intelenet of Michigan, Inc.*, 16 F. Supp. 2d 817 (W.D. Mich. 1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications*, 9 F. Supp. 2d 766 (E.D. Ky. 1998); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Ore. 1998); *US West Communications, Inc. v. Public Serv. Comm'n*, 991 F. Supp. 1299 (D. Utah 1998).

Having found that neither the constructive waiver doctrine nor the *Ex parte Young* doctrine is available under the 1996 Act, the Court concludes that the Eleventh Amendment bars this suit against the PSC and Commissioners.

3. *Remaining Defendants*

The PSC, in its motion to dismiss, argued that it is an indispensable party under Fed. R. Civ. P. 19 and that, therefore, the suit cannot proceed in its absence. The joint opponents[16]—but not plaintiff Bell Atlantic[17]—argue that this case may proceed without the PSC. Having considered and weighed the four factors set forth in Fed. R. Civ. P. 19(b)[18] to determine whether the PSC is indispensable, the Court concludes that the PSC is indeed an indispensable party in this case; therefore, this suit cannot proceed without it.

The joint opponents downplay the effect that going forward without the PSC would have on the PSC, but

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Though those in favor outnumber those against, decisions of an issue of such magnitude is not a simple matter of counting courts, but of independent analysis, especially where delicate matters of federal power are at issue. Such, indeed, was the situation before the Supreme Court invalidated the Religious Freedom Restoration Act of 1993 in *City of Boerne v. Flores*, 521 U.S. 507 (1997), when only a few courts (including this one) had ruled the statute unconstitutional, though many had endorsed it.

[16] MFS Intelenet of Maryland, Inc., MCIMETRO Access Transmission Services LLC and TCG Maryland, Inc.

[17] Bell Atlantic had the opportunity to brief the indispensable party issue, because the PSC raised the issue in its motion to dismiss, but Bell Atlantic did not address the issue in its opposition motion.

[18] Under Rule 19(b), the Court must weigh four factors: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

proceeding without the PSC would severely prejudice the PSC. In fact, the Court cannot give Bell Atlantic any of the relief it requests without first declaring the PSC's Order invalid and unlawful, implicating the very sovereign immunity concerns that protect the PSC from suit in the first instance: respect for the state's dignity and autonomy. A federal court's declaration that a state agency's order is unlawful could cripple that agency's effectiveness and independence. *See AT&T Communications*, 43 F. Supp. 2d at 603 (noting that declaration that state commission's actions violate 1996 Act would result in disrespect for state autonomy in decision-making). *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984) (a suit against the state is one where "the judgment sought would . . . interfere with the public administration . . . or restrain the Government from acting, or to compel it to act") (internal citations omitted); *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 548 (2d Cir.) (presence of sovereign immunity is "compelling" factor under Rule 19(b)), *cert. denied*, 502 U.S. 818 (1991). Also, the Court does not believe it can tailor any adequate remedy to avoid or minimize the prejudice to the PSC.

And, although it may appear that Bell Atlantic would have no adequate relief if the case is dismissed, Bell Atlantic is not precluded from seeking relief in state court, by this Court's interpretation of the 1996 Act. Concurrent state court jurisdiction will be denied only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Tafflin v. Levitt*, 493 U.S. 455, 459-460 (1990) (internal citations omitted). None of these requirements is met here. By the plain meaning of the purported exclusive jurisdiction provision in the 1996 Act, there is no exclusive federal jurisdiction over the complaint in this case, because Bell Atlantic is not seeking review "of a State commission in approving or rejecting an agreement under this section." *See*

§ 252(e)(4); *see also Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993) ("The most persuasive evidence of . . . [congressional] intent is the words selected by Congress.") (internal citations omitted). Indeed, Bell Atlantic initially sought relief from a related PSC order (issued prior to the FCC declaratory ruling) in the Circuit Court for Montgomery County, which affirmed the PSC's conclusion that the agreement meant that Bell Atlantic must pay reciprocal compensation for calls to internet service providers.

Finally, even if Congress intended that § 252(e)(4) have such broad reach as to preclude state court review of suits such as the one presently before the Court, such provision must be invalidated because the Court may infer that Congress would have intended state court review, had it known the judicial review provision it enacted in § 252(e)(6) would be ineffectual. *See Tafflin*, 493 U.S. at 459-460 (noting strong presumption in favor of concurrent state court jurisdiction). *See* Bell Atlantic's Opp'n at 20 ("There can be no doubt that Congress would not have authorized States to wield federal regulatory authority if their actions were not subject to judicial review.").

B. *Ripeness Doctrine*

Count II must be dismissed on the alternative ground that it is not ripe for judicial review. In Count II, Bell Atlantic alleges that "the PSC's decision to require reciprocal compensation for Internet traffic in instances where the parties cannot agree on the rules governing compensation for such traffic violates federal law. . . ." Compl. at 13. Bell Atlantic requests that the Court declare the PSC's decision unlawful and enjoin defendants, and all parties acting in concert with them, from seeking to enforce it against Bell Atlantic. *Id.*

Article III of the Constitution limits the judicial power of the federal courts to the resolution of actual cases or controversies. *Gasner v. Bd. of Supervisors of*

the County of Dinwiddie, Va., 103 F.3d 351, 361 (4th Cir. 1996). U.S. Const. art. III, § 2, cl. 1. *See also* 28 U.S.C. § 2201. An actual controversy exists in a case challenging administrative action only when "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 208 (4th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993) (quoting *Pacific Gas & Elec. Co. v. Energy Resources Comm'n*, 461 U.S. 190, 200 (1983)). A claim is not ripe where the plaintiff has not "suffered any injury thus far and the future effect of the [Order] remains wholly speculative." *Gasner*, 103 F.3d at 361.

In determining whether a claim is ripe for adjudication, a court evaluates two factors: (1) whether the issues are fit for judicial decision; and (2) whether hardship will fall to the petitioning party on withholding court consideration. *Charter Fed.*, 976 F.2d at 208 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). A claim is fit for judicial decision where the question presented is a "purely legal one [] and where the agency rule or action giving rise to the controversy is final and not dependent upon future uncertainties or intervening agency rulings." *Charter Fed.*, 976 F.2d at 208. The hardship factor is measured by "the immediacy of the threat and the burden imposed on the petitioner who would be compelled to act under threat of enforcement of the challenged law." *Id.* at 208-09. Applying these principles to Count II, the Court holds that the claim is not ripe for review.

As to *Abbott*'s first factor, fitness of the issues for judicial decision, several future uncertainties could affect the case, and intervening rulings might be issued. First, Bell Atlantic might negotiate its own terms for whether reciprocal compensation is required for internet calls, without regard to the Order. *See* the Order at 17 ("The parties are of course free to negotiate another compensation rate to be applied to ISP-bound traffic."). Second, the PSC might change its decision in

the context of actual agreements. *See GTE North Inc. v. McCarty*, 978 F. Supp. 827, 836 (N.D. Ind. 1997) ("state commissions are unable to rule with finality on issues addressed by their own orders until they have seen how those issues function, both economically and pragmatically, in the context of a completed agreement . . . That observation supports this court's view that a state commission might change its mind once it reviews a completed agreement."). The PSC has emphasized that the Order is an "interim" and "temporary" one, meant to exist only until the FCC resolves the matter. Finally, the question of whether a state commission is permitted to require reciprocal compensation for internet-bound calls, absent a voluntary agreement, is on review before the D.C. Circuit; oral argument is scheduled for November 1999. *See Bell Atlantic Tel. Cos. v. FCC*, No. 99-1094 (D.C. Cir.). *See* Pl.'s Mot. for Summ. J. at 21 n.9. If that question is answered in the negative, in all likelihood the PSC would rescind part two of its Order, given that it was based on its reading of that FCC ruling.

As to *Abbott*'s hardship factor, Bell Atlantic's complaint does not allege any particular harm, nor does there appear to be an immediacy of a threat to enforce the Order. *See AT&T Corp.*, 525 U.S. 366 (noting that where "no immediate effect on Plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements"). The Order affects parties that do not have interconnection agreements, after lengthy arbitration proceedings occur. The Court declines to base its jurisdiction on what might or might not occur in future arbitration proceedings. The better course is that any injury that might occur from the Order in future arbitration proceedings be challenged by seeking judicial review once an arbitrated agreement is in place. In sum, applying the *Abbott* test, the Court believes review of the claim in Count II—that the PSC may incorporate a term requiring reciprocal compensation payment for internet bound calls in *future*

agreements between Bell Atlantic and as yet *unnamed* parties—at this time would be premature.

Moreover, the Court agrees with the PSC that Count II is not ripe for review under § 252(e)(6), because that section permits federal court review of interconnection agreements or statements of generally available terms, and Bell Atlantic, in Count II, does not seek review of either. *See, e.g., MCI Telecommunications v. Frisby*, 998 F. Supp. 625 (D. Md. 1998) (noting that claim is not ripe for review absent interconnection agreement); *GTE North Inc.*, 978 F. Supp. 827 (same). Bell Atlantic admits that no agreement is in place for its Count II claim, but argues that an approved statement of generally available terms ("SGAT") makes the claim ripe for review under § 252(e)(6). In an attempt to bring its claim within the scope of § 252(e)(6) review, Bell Atlantic frames the PSC's determination of which it seeks judicial review as an "interpretation of Bell Atlantic's obligations under its existing SGAT." Bell Atlantic Opp'n at 31. A tangential reference to a SGAT, however, does not bring the claim within the ambit of § 252(e)(6) review.

The core issue that Bell Atlantic wants this Court to review is the PSC's decision that parties that do not have agreements will be required to pay reciprocal compensation for Internet traffic; the decision does not affect the SGAT or the scope of Bell Atlantic's obligations thereunder. The previously-approved SGAT (which presumably Bell Atlantic itself submitted for approval to the PSC) simply provides the compensation rates that will apply when and if the PSC enforces its ruling. Thus, the determination of the PSC for which Bell Atlantic seeks review, being totally independent from the PSC's approval of the SGAT, is not ripe for § 252(e)(6) review until an interconnection agreement is in place.

Even if the claim in Count II were ripe, the Court, in the exercise of its discretion over declaratory judgment actions, will decline such jurisdiction for the same

reasons set forth in the ripeness discussion, *supra*. *See* 28 U.S.C. § 2201; *see Charter Fed.*, 976 F.2d at 208-09. *See also Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 243 (1952) (noting federal courts must not assert jurisdiction over declaratory judgment actions "through obtaining futile or premature interventions, especially in the field of public law").

C. *Section 1331 Jurisdiction*

Bell Atlantic also argues that if the Court does not have jurisdiction under § 252(e)(6), that the Court has independent jurisdiction under 28 U.S.C. § 1331. Even if this Court were willing to recognize an independent federal cause of action under § 1331 (which it is not), Bell Atlantic would have to contend with the Eleventh Amendment, discussed *supra*, which is a "real limitation on a federal court's federal-question jurisdiction." *See Coeur d' Alene*, 521 U.S. at 270. *See MCI Telecommunications*, 998 F. Supp. 625 (holding § 1331 and *Ex parte Young* unavailable to bypass Eleventh Amendment absent jurisdiction under § 252(e)(6)).

III. CONCLUSION

For the foregoing reasons, this Court concludes that this suit against the PSC and the Commissioners is barred by the Eleventh Amendment. In addition, the Court concludes that Count II is not ripe for review, and the Court in the exercise of its discretion under § 2201 does not believe review of Count II is proper at this time. The Court also concludes that the PSC is an indispensable party. Accordingly, this Court lacks subject matter jurisdiction, and the Court will GRANT the motion to dismiss of the PSC and the Commissioners. An appropriate order will be entered separately.

Dated: October 20, 1999

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

APPENDIX C

STATE OF MARYLAND
PUBLIC SERVICE COMMISSION

Case No. 8731

IN THE MATTER OF THE COMPLAINT OF MFS INTELNET OF MARYLAND, INC. AGAINST BELL ATLANTIC-MARYLAND, INC. FOR BREACH OF INTERCONNECTION TERMS AND REQUEST FOR IMMEDIATE RELIEF

Order No. 75280

[June 11, 1999]

I. INTRODUCTION

This matter comes before the Commission pursuant to a Petition of Bell Atlantic-Maryland, Inc. ("BA-MD") for Declaratory Order that Internet Traffic is not "Local" Traffic Subject to Reciprocal Compensation ("Petition"). Specifically, BA-MD seeks an order declaring that, pursuant to the February 25, 1999 Federal Communications Commission ("FCC") Order,[1] and under the terms of BA-MD's interconnection agreements, calls from BA-MD's network to Internet Service Providers ("ISPs") served by interconnecting carriers do not constitute local traffic subject to reciprocal compensation. By Letter Order dated March 17, 1999, the Commission requested that parties file comments on BA-MD's petition by March 29, 1999.

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96 (rel. February 26, 1999) ("ISP Order").

The Commission received comments from fifteen parties.[2] BA-MD filed a letter response to these comments on March 31, 1999 and filed a more extensive response on April 6, 1999. On April 14, 1999, the Commission heard oral argument during its weekly administrative meeting.

II. BACKGROUND

On February 8, 1996, President Clinton signed into law the Telecommunications Act of 1996 ("1996 Act"), which establishes a framework for opening the local telephone markets to competition.[3] In order to promote competition in the local exchange telecommunications market, the 1996 Act imposes a general duty on all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. 47 U.S.C. §251(a). With regard to incumbent local exchange carriers ("ILECs") such as BA-MD, the duty to interconnect is even more specifically defined by Section 251(c)(2).

In conjunction with the above-mentioned interconnection obligations, the 1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. §251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that a State commission shall not consider the terms and conditions for reciprocal compensation to be just

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[2] Parties filing comments included AT&T, Commission Staff, MCI Worldcom, Global NAPS South, Inc., Office of People's Counsel, Starpower Communications, Inc., Focal Communications Corporation, KMC III Telecom, Inc., Choice One Communications, Inc., Sprint Communications Company L.P., Prism Operations LLC, Intermedia Communications, Inc., e.spire Communications, Inc., Association for Local Telecommunications Services, and Conectiv Communications, Inc.

[3] *See*, 47 U.S.C. §§251-261. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), is codified throughout title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. §252(d)(2)(A). However, it should be noted that ILECs may negotiate and enter into a binding agreement with a requesting telecommunications carrier without regard to the standards set forth in Sections (b) and (c) of §251. 47 U.S.C. §252(a)(1).

The procedures for negotiations between Competitive Local Exchange Carriers ("CLECs") and ILECs are governed by §252 of the Act. If negotiating companies cannot reach agreement, §252 provides that the parties may request that the appropriate State commission arbitrate unresolved issues. Each interconnection agreement must be submitted to the State commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated, in whole or part, by the State commission. 47 U.S.C. §252(e)(1). However, the State commission may only reject a negotiated agreement if it finds that the agreement or a portion thereof discriminates against a telecommunications carrier not a party to the agreement, or the implementation of such an agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C. §252(e)(2)(A).

The issue of the correct treatment of ISP-bound traffic first arose in Maryland when MFS Intelenet of Maryland, Inc. ("MFS") filed a complaint requesting that we enforce the reciprocal compensation provisions of the interconnection agreement between MFS and BA-MD. ("MFS agreement"). MFS is a local exchange carrier providing telephone services in various regions of Maryland in competition with BA-MD. On July 16, 1996, MFS and BA-MD entered into an interconnection

agreement under §§251 and 252 of the 1996 Act. Among other things, the MFS agreement contains terms addressing provision of interconnection and reciprocal compensation between the parties. Pursuant to §252 of the 1996 Act, the MFS agreement was filed with the Commission and we approved the agreement on October 9, 1996.[4] Pursuant to the MFS agreement, MFS and BA-MD exchange traffic between their respective networks, so that a customer subscribing to MFS' local exchange service can place calls to customers subscribing to BA-MD's local exchange service, and vice versa. Both MFS and BA-MD provide local exchange services over their respective networks to end use customers, including some business customers operating as ISPs.

On April 28, 1997, nine months after entering into the MFS agreement and six months after we approved that agreement, BA-MD sent a letter to MFS stating that it intended to discontinue payments of reciprocal compensation for local exchange traffic terminating to ISPs. In its letter, BA-MD claimed that local exchange traffic delivered to ISPs was ineligible for reciprocal compensation and stated that BA-MD intended to withhold reciprocal compensation payments for traffic BA-MD believed may be delivered to ISPs. BA-MD further indicated that it would seek refund of money previously paid as compensation for such calls.

On May 21, 1997, MFS filed a complaint with the Commission alleging that the actions of BA-MD violated the 1996 Act and the MFS agreement. Specifically, MFS alleged that BA-MD's actions were contrary to the plain language of the MFS agreement. According to MFS, Sections 1.44 and 1.61 of the MFS agreement

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[4] *In the Matter of the Petitions for Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996*, Case No. 8731, Phase(a), Order No. 72939, 87 Md. PSC 210 (Oct. 9, 1996).

established the parameters for reciprocal compensation between MFS and BA-MD. These sections state:

> 1.44 "Local Traffic" means traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ("EAS") area, as defined in BA's effective Customer tariffs. Local Traffic does not include traffic originated or terminated by a commercial mobile radio service carrier.
>
> 1.61 "Reciprocal Compensation" is As Described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Local Traffic originating on one Party's network and terminating on the other Party's network.

MFS contended that pursuant to these provisions, to the extent an ISP purchases local exchange service from MFS and receives calls which originate from users of BA-MD provided local exchange service, BA-MD is obligated to pay reciprocal compensation to MFS for termination of such calls. MFS requested that the Commission declare the MFS agreement's reciprocal compensation provisions fully applicable to calls that terminate at ISPs. On July 2, 1997, BA-MD responded to the MFS complaint. In its response, BA-MD contended that ISP traffic is interstate and the Commission should leave the determination of what compensation is due to the FCC.

On September 11, 1997, we released our Letter Order in response to the MFS complaint. In this Order, we noted that "the primary issue presented is resolvable pursuant to the terms of the BA-MD/MFS

Interconnection Agreement."[5] We accordingly found that MFS was entitled to compensation for the transport and termination of ISP-bound telephone calls. BA-MD's Petition for Reconsideration of the MFS Order was subsequently denied by the Commission.[6]

We considered this issue a second time within the context of a Sprint Communications Company, LP ("Sprint") complaint. On December 2, 1998, Sprint filed a Motion for Resolution of Disputed Issue. This motion was filed in response to BA-MD's refusal to sign an interconnection agreement unless it stated that Internet traffic is not local and not subject to reciprocal compensation. Sprint sought a Commission ruling on how ISP-bound calls should be treated. Basically, Sprint wanted the Commission to find that ISP-bound traffic was local and therefore, subject to reciprocal compensation. After consideration of the comments filed by Sprint, BA-MD and Staff, the Commission concluded that ISP-bound calls "are classified as local in nature and are therefore, subject to reciprocal compensation" from BA-MD.[7]

On February 26, 1999, the FCC released its Order clarifying the jurisdictional status of calls to ISPs.[8] The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate."

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[5] Letter from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Bell Atlantic-Maryland, Inc. and Andrew D. Lipman, Swidler & Berlin, Chg. (Sept. 11, 1997). ("MFS Order").

[6] Letter from Daniel P. Gahagan, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Bell Atlantic-Maryland, Inc. (Oct. 1, 1997).

[7] Letter from Felecia L. Greer, Executive Secretary, Maryland Public Service Commission, to David K. Hall, Bell Atlantic-Maryland, Inc. and Cathy Thurston, Sprint Communications Company L.P. (Feb. 9, 1999) ("Sprint Order").

[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96 (rel. February 26, 1999) ("ISP Order").

However, the FCC further concluded that given the absence of a "federal rule regarding the appropriate inter-carrier compensation mechanism for this traffic, that parties should be bound by their existing interconnection agreements, as interpreted by state commissions."[9] Thus, the FCC permitted states which have treated ISP-bound traffic as local under interconnection agreements to continue to require ILECs to compensate CLECs under contractual principles or other legal or equitable considerations.[10]

III. DISCUSSION

BA-MD's argument essentially is that because the FCC has determined that ISP-bound calls are largely interstate in nature, BA-MD can no longer be required to provide reciprocal compensation under its interconnection agreements because reciprocal compensation only applies to local traffic. If the finding that ISP-bound traffic is largely interstate was all that the FCC had decided, BA-MD's contention probably would be correct.

However, the FCC also went on to state that this conclusion is not dispositive of interconnection disputes currently before state commissions.[11] The FCC noted that, since 1983, the FCC itself has treated ISP-bound traffic as though it were local.[12] "In addition, ILECs characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes."[13] The FCC found that "[A]gainst this backdrop, and in the absence of any contrary [FCC] rule, parties entering into interconnection agreements may reasonably have agreed, for purposes of determining whether

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[9] *Id.*, at para. 1. See, also, para. 22.

[10] *Id.*, at para. 27.

[11] *ISP Order*, at para. 20.

[12] *Id.*, at para. 23.

[13] *Id.*

reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic."[14] Thus, the clarification of the jurisdictional issue was not the FCC's only holding.

The FCC took the opportunity to issue some subsidiary conclusions. First, the FCC made clear that its jurisdictional determination did not in itself establish whether reciprocal compensation is due in any particular instance. The FCC recognized that parties might have agreed to reciprocal compensation for ISP-bound traffic, or a State commission exercising its authority under §§251 and 252 of the 1996 Act might have imposed reciprocal compensation obligations for this traffic.

The FCC developed a list of factors State commissions should consider when construing interconnection agreements to determine whether the parties agreed that ISP-bound calls should be treated as local at the time the contract was entered into. These factors include:

1. negotiation in the context of the FCC's longstanding policy of treating ISP traffic as local;
2. the conduct of the parties pursuant to those agreements;
3. whether ILECS serving ISPs have done so out of intrastate or interstate tariffs;
4. whether revenues associated with those services were counted as intrastate or interstate revenues;
5. whether there is evidence that ILECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; and

[14] *Id.*, at para. 24.

6. whether, if ISP traffic is not treated as local and subject to reciprocal compensation, ILECs and CLECs would be compensated for this traffic.

While many of these factors constitute nothing more than an ILEC following established FCC procedures, the factors demonstrate that at the time the interconnection agreements were entered into, ISP-bound traffic was consistently treated as if it were local. Thus, if any of the ILECs wanted to change the prevailing view for purposes of reciprocal compensation negotiations, the companies were obligated to raise this issue during negotiations. Silence on the issue would logically be construed as accepting the prevailing treatment for ISP-bound traffic.

Furthermore, the FCC also found that even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, "State commissions may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic."[15] According to the FCC, because no current rule exists on this specific issue, State commissions have had "no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation."[16]

Clearly, the FCC's interpretation of the 1996 Act is that, in view of the absence of FCC rule to the contrary, State commissions have authority to decide whether ILECs and CLECs intended to treat ISP-bound traffic as local when they negotiated their agreements. If the parties did, then the State commissions have authority to require that such intention be honored. Moreover, the FCC's ruling is that State commissions have

[15] *Id.*, at para. 25.

[16] *Id.*, at para. 26.

authority in arbitration proceedings to require that reciprocal compensation be paid even if the parties do not agree.

Our ISP decisions have taken two different tracks. In the MFS decision, the Commission concluded that, under contract principles, pursuant to the interconnection agreement between the parties, MFS was entitled to compensation for termination of calls to ISPs. In this decision, we did not make a determination as to the jurisdictional nature of calls to ISPs. We concluded that the parties intended for ISP calls to be local. In contrast, in the Sprint decision, the Commission did address the jurisdictional nature of calls to ISPs and concluded that these calls were local. Since we find that a different analysis should be applied in the context of an approved negotiated interconnection agreement as opposed to an arbitration order, we will separately discuss whether CLECs should receive reciprocal compensation for ISP-bound traffic under each of these scenarios.

A. Approved Negotiated Interconnection Agreements

The primary issue in this context is relatively straightforward. We must determine whether the parties to the approved interconnection agreements intended, at the time those agreements were entered into, to treat ISP-bound telephone calls as local traffic subject to the payment of reciprocal compensation.[17] First, we must focus on the actual language of the interconnection agreement under review. We begin our assessment with a review of the provisions which define local traffic and address the reciprocal compensation obligations of BA-MD and MFS. The terms and conditions of the MFS agreement which define local

[17] Under well-established principles of contract construction, the parties' intent is determined at the time of contracting, not at some subsequent date. See, e.g., *Hardy v. Brookhart*, 259 Md. 317, 326-27 (1970).

traffic are found in Section 1.44 of the original agreement executed between MFS and BA-MD on July 16, 1996. This section states:

> 1.44 "Local Traffic" means traffic that is originated by a Customer of one Party on that Party's network and terminates to a Customer of the other Party on that other Party's network, within a given local calling area, or expanded area service ("EAS") area, as defined in BA's effective Customer tariffs. Local Traffic does not include traffic originated or terminated by a commercial mobile radio service carrier.

Also under review are the provisions addressing the reciprocal compensation obligations of both BA-MD and MFS. Section 1.61 reflects the mutual agreement of the parties, and that subsection reads in pertinent part:

> 1.61 "Reciprocal Compensation" is As Described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Local Traffic originating on one Party's network and terminating on the other Party's network.

At the time the interconnection agreement was entered into, ISP traffic was treated as local in virtually every respect by all industry participants, including the FCC. BA-MD was fully aware of the industry's prevailing local treatment of ISP traffic at the time that it entered into the interconnection agreement in question. In fact, BA-MD afforded ISP traffic local treatment in the same respect that the CLECs did at the time. Thus, at the time the interconnection agreement was entered into, the prevailing local treatment of ISP traffic already was in place. Even today, both BA-MD and the CLECs charge their ISP customers local business line rates for local telephone exchange service that enables the ISP's customers to access their service via a local call. The service provided to ISP

customers by both BA-MD and CLECs falls under their local exchange tariffs and calls to ISPs are rated and billed just as any other local calls. Neither BA-MD nor the CLEC assesses toll charges for those calls. Further indication of the prevailingly local treatment afforded ISP traffic is the fact that BA-MD records the minutes of use associated with such calls as local for ARMIS reporting requirements with the FCC. Finally, BA-MD characterizes expenses and revenues associated with ISP-bound traffic as intrastate for jurisdictional separation purposes.

Even the FCC noted in its *ISP Order* that since 1983, it has treated ISPs as end users under the access charge regime and permitted them to purchase their links to the public switched telephone network through intrastate business tariffs rather then through interstate access tariffs. The FCC specifically recognized that it has, by the actions in that regard, discharged its interstate regulatory obligations through the application of local business tariffs and has thus treated ISP-bound traffic as though it were local.

Perhaps the most persuasive evidence that BA-MD did not intend to exclude calls to ISPs from the definition of local traffic is found in the conspicuous absence of a mechanism to track, separate and exclude ISP traffic from the local billing records of the CLECs. BA-MD certainly was in a position to know that such a mechanism would be necessary to segregate ISP traffic from local calls, yet no attempt was ever made to develop and incorporate such a mechanism.[18] Although BA-MD was well aware of the existence of ISP traffic at the time the MFS agreement was negotiated, it made no

[18] In conjunction with the prevailing local treatment afforded ISPs, BA-MD's actions immediately subsequent to executing the agreement evidence an intent to treat ISP-bound calls as local traffic. After our approval of the MFS agreement, MFS and BA-MD began operating under its terms and for many months, paid one another the agreed upon local compensation rates for the transport and termination of calls, including ISP-bound calls.

effort to exclude calls to ISPs from the definition of local traffic, but did expressly exclude commercial mobile radio service traffic. In contrast, there is no indication that the MFS agreement contemplated the segregation of ISP traffic, either as toll or as a "unique" form of local traffic.

Based on the foregoing, and recognizing the prevailing local treatment of ISP traffic at the time the agreement was executed, we conclude that the regulatory and industry custom at that time dictated that ISP traffic be treated as local, and therefore, subject to reciprocal compensation. We find that the treatment of ISP traffic as local was so prevalent in the industry at that time that BA-MD, if it so intended, had an obligation to negate such local treatment in the interconnection agreements it entered into by specifically excluding ISP traffic from the definition of local traffic subject to the payment of reciprocal compensation.

Given the comprehensive nature of the MFS agreement and the specificity with which they address virtually all interconnection issues, we find it difficult to understand how BA-MD could fail to insist on a specific itemized exception excluding ISP traffic. BA-MD's knowledge of that regulatory and industry custom made it imperative that BA-MD specifically exclude calls to ISPs from the definition of local traffic subject to the payment of reciprocal compensation.[19] Given the circumstances then existing, we find the absence of such a specific exclusion or exception to be persuasive of the fact that BA-MD did not intend to exclude ISP traffic from the definition of local traffic when it entered into the MFS agreement. Under all of the circumstances existing at the time the contract was entered into, we conclude that the parties contemplated

[19] It should be noted that, unless a contract provides otherwise, the law applicable at the time and place the contract is entered into is to be considered a part of that contract. See, e.g., *Denice v. Spotswood I. Quinby, Inc.*, 248 Md. 428, 433-34 (1968).

reciprocal compensation payments for ISP traffic. For MFS and those CLECs who "opted-in" to the MFS agreement, this conclusion means that those parties shall receive reciprocal compensation for ISP-bound calls until July 1, 1999 under the rates set forth in the interconnection agreement.[20]

In conclusion, we find that with regard to the MFS agreement, telephone calls originating from a BA-MD provided telephone service end user to the respective ISP end users of MFS are subject to the reciprocal compensation provisions of that agreement. Based on the discussion above, we find that BA-MD was clearly in a position to know that the specific exclusion of such traffic from the definition of local traffic for purposes of the payment of reciprocal compensation was a necessity. BA-MD failed to incorporate such an exclusion and is, therefore, in breach of the MFS agreement under which it has withheld reciprocal compensation for ISP traffic.

Accordingly, we find that BA-MD must within 15 days of the effective date of this Order, pay all reciprocal compensation amounts withheld for ISP traffic under the MFS agreement. BA-MD also must continue to pay such amounts for the duration of the MFS agreement.

B. Arbitrated Agreements

The issue of whether parties who arbitrated the issue of reciprocal compensation for ISP-bound calls are still entitled to that compensation in light of the FCC's *ISP*

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[20] *See*, MFS agreement at §22.1. BA-MD's more recent interconnection agreements include explicit language excluding calls to the Internet from the payment of reciprocal compensation. See, e.g., Interconnection Agreement between BA-MD and Transwire Operations, LLC (Dec. 18, 1998) and Interconnection Agreement between BA-MD and Omnipoint Communications Enterprises, L.P. (Nov. 24, 1998). These parties, and any parties similarly situated would not be entitled to reciprocal compensation for ISP-bound calls. These parties are bound to their contractual agreement in the same manner and to the same extent as BA-MD.

Order is more problematic. Obviously, there is no question of BA-MD having agreed that ISP-bound calls were local in this situation. BA-MD vigorously argued in its negotiations with Sprint, for example, that ISP-bound calls were not "local traffic." Furthermore, as noted earlier, in the arbitration we concluded that ISP-bound calls were local. This conclusion appears to have been brought into question by the FCC's *ISP Order*.

However, even this conclusion does not totally resolve the issue. The FCC found that, even in cases where a State commission does not find that the parties voluntarily agreed on an inter-carrier compensation scheme, or where a state has not addressed the issue, "state commissions may nevertheless determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic."[21] State commissions may make such determinations "pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate *interim* inter-carrier compensation rule" pending completion of the FCC rulemaking on this issue.[22] Until such time as a federal inter-carrier compensation mechanism is developed, the FCC left the determination of the applicability of reciprocal compensation entirely to State commissions. Thus, under the FCC's *ISP Order*, it is incumbent upon this Commission to determine an interim cost recovery methodology which may be used until the FCC completes its rulemaking on this issue and adopts a federal rule governing inter-carrier compensation arrangements.[23]

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[21] *ISP Order*, at para. 25.

[22] *Id.*, at para. 27 (emphasis added).

[23] Specifically, the FCC stated that "[A]lthough reciprocal compensation is mandated under Section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain circumstances not addressed by Section 251(b)(5), so long as there is no conflict with governing federal law." *ISP Order*, at para. 26.

In fact, according to the FCC, "State commissions are free to require reciprocal compensation for ISP-bound calls, or not require reciprocal compensation and **adopt another compensation mechanism**, bearing in mind that ISP/ESPs are exempt from paying access charges."[24] This directive does not leave us the option of providing for no compensation for ISP-bound calls. State commissions must either require reciprocal compensation or develop another compensation mechanism. To fail to provide for any compensation would violate the 1996 Act, which states:

> A State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier. 47 USC § 252(d)(2)(A).

We are very concerned that the adoption of BA-MD's position will result in CLECs receiving no compensation for terminating ISP-bound traffic. Such an effect will be detrimental to our efforts to encourage competition in Maryland. No one disputes that local exchange carriers incur costs to terminate the traffic of other carriers over their network. In the absence of finding that reciprocal compensation applies, a class of calls (ISP traffic) will exist for which there is no compensation. The reciprocal compensation rates established by our arbitration order and contained in the approved Statement of Generally Available Terms ("SGAT") reflect the costs of this termination. Until the FCC establishes an appropriate inter-carrier compensation mechanism for ISP-bound traffic, we find that it is in the public interest to require BA-MD to pay our arbitrated reciprocal compensation rates contained in

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[24] *ISP Order*, at para. 26 (emphasis added).

the SGAT as an **interim** compensation mechanism. Absent such a mechanism, CLECs will be forced to absorb these costs. However, we wish to stress that this compensation rate is a temporary, but necessary, measure. The parties are of course free to negotiate another compensation rate to be applied to ISP-bound traffic. In any event, our interim rate will only apply until the FCC issues an order creating its inter-carrier compensation mechanism for ISP-bound traffic.

IT IS, THEREFORE, this 11th day of June, in the year Nineteen Hundred and Ninety-Nine, by the Public Service Commission of Maryland,

ORDERED: (1) That the parties shall reconcile the amounts owed and Bell Atlantic-Maryland, Inc. shall remit payment of reciprocal compensation charges previously withheld within 15 days of this order.

(2) That Bell Atlantic-Maryland, Inc. shall continue to pay reciprocal compensation for ISP-bound traffic under its agreement with MFS and any CLECs who opted in to that agreement until the expiration of the MFS agreement.

(3) That, on an interim basis, the inter-carrier compensation mechanism for ISP-bound calls for providers not currently operating under an approved interconnection agreement, shall be the reciprocal compensation rates established in our arbitration Order as contained in the approved SGAT.

/s/ Glenn F. Ivey
/s/ Claude M. Ligon
/s/ Susanne Brogan
Commissioners

DISSENTING OPINION OF E. MASON HENDRICKSON AND GERALD L. THORPE, COMMISSIONERS

We respectfully dissent from the majority's decision in Order No. 75280 concerning Bell-Atlantic Maryland's ("Bell" or "BA-MD") petition for a Declaratory Order that Internet Traffic is not "Local" Traffic Subject to Reciprocal Compensation ("Petition"). It is our position that the February 26, 1999 Federal Communications Commission Order[1] is very clear in respect to the finding that calls from BA-MD's network to Internet Service Providers ("ISPs") served by interconnecting carriers are not local traffic subject to reciprocal compensation.

To recount some history, we concurred with both the Commission's September 7, 1997 Letter Order upholding MFS Intelenet of Maryland, Inc.'s ("MFS") complaint that Bell was refusing compensation for ISP calls, and the Letter Order of October 1, 1997 denying BA-MD's Petition for Reconsideration of the September 7 ruling. We did so on the ground that the FCC had earlier established the position that ISP calls are to be treated as if they were local in nature. Given this position, the legal right of MFS to recover reciprocal compensation through a mutually agreed-upon interconnection agreement seemed clear.

Not decided in these Letter Orders was the issue of what would happen if the FCC later deemed these calls not to be local in nature.[2] In the September 11, 1997 decision, for instance, the Commission noted that this "issue is currently being considered by the FCC and

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96 (rel. February 26, 1999).

[2] Also not decided in those Letter Orders was the issue of what would happen if calling volumes turned out to disproportionally favor one competitor over another and the impact such disproportionality could have on the competitive environment. We discuss that issue shortly.

may ultimately be resolved by it." The Commission then stated that "[i]n the event that the FCC issues a decision that requires revision to the directives announced herein, the Commission expects that the parties will so advise."

The language in Bell's interconnection agreement with MFS defines "Reciprocal Compensation" as involving "payment arrangements that recover costs incurred for the transport and termination of Local Traffic." Therefore, it is our view that the FCC's February 26, 1999 ruling removes any obligation of BA-MD to make payments under the reciprocal compensation provisions of the agreement for ISP-bound calls made after the date of the decision, because ISP-bound traffic no longer is defined as local in nature.

Further, we disagree with the majority's position that since Bell knew that ISP-bound traffic was included in the definition of local traffic at the time of the agreement, it is therefore stuck with the consequences until the expiration of the agreement even though the regulatory classification of ISP-bound traffic changed after the parties executed the agreement. Bell was reluctantly bound by the existing regulatory definition when it signed the agreement. Upon the FCC's change in the regulatory definition of ISP traffic, the operative definition in the Interconnection agreement between MFS and Bell now clearly excludes ISP bound traffic from the reciprocal compensation terms established for local traffic. This Commission has responsibilities to ensure the protection of the public good and the ability to revisit decisions due to public policy considerations should circumstances warrant it. The FCC's revised finding is, in our opinion, such an occasion.

In addition, as a result of examining the unbalanced ISP compensation flow between incumbent local exchange companies ("ILECs") and competing local exchange companies ("CLECs") nationally and in Mary-

land, it appears increasingly obvious that continuing the fiction of demanding compensation for ISP-bound calls as if they were local can be anti-competitive. Further, there are indications that some carriers are gaming the system to take advantage of the previous FCC policy, instead of competing on the basis of the ability to effectuate a sound business plan. Therefore, adhering to the policy that produced such unbalanced reciprocal compensation discourages, rather than encourages, actual competition for customers.

Accordingly, we do not share the majority's inclinations that the FCC's order leaves us limited options for alternative compensation arrangements for ISP-bound calls. Indeed, the FCC's order specifically states that parties to reciprocal compensation agreements continue to be bound by them, "as interpreted by [their] state commissions." That is, there is nothing in the FCC's order that would prevent a carrier from seeking reconsideration of a prior Commission order on this subject, or for that Commission to modify the earlier order.

Our preferences in this Order would have been as follows:

1. To grant, but modify, Bell's petition for a Declaratory Order by finding that calls from BA-MD's network to ISPs served by interconnecting carriers no longer constitute local traffic subject to reciprocal compensation after the date of the FCC's February 26, 1999 order;
2. For the parties to reconcile the amounts owed and for Bell to remit payment of reciprocal compensation charges for calls to ISPs made prior to February 26, 1999; and
3. To find that BA-MD shall not be liable to pay reciprocal compensation for ISP-bound calls made after February 26, 1999 under its

agreement with MFS and under its agreements with any other CLECs who opted into this provision of the MFS agreement.

/s/ E. Mason Hendrickson
Commissioner

/s/ Gerald L. Thorpe
Commissioner

APPENDIX D

Constitutional Provision

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statutory Provisions

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

47 U.S.C. § 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the

agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering Administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusve jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than

subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C. § 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negoti ated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation

and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory [illegible]tion

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and

reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject—

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by

negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of state commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), and 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

47 U.S.C. § 261. Effect on other requirements

(a) Commission regulations

Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to February 8, 1996, in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part.

(b) Existing State regulations

Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after February 8, 1996, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) Additional State requirements

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

Regulatory Provisions

47 C.F.R. § 51.701. Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers.

(b) *Local telecommunications traffic.* For purposes of this subpart, local telecommunications traffic means:

(1) Telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission; or

(2) Telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) *Transport.* For purposes of this subpart, transport is the transmission and any necessary tandem switching of local telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) *Termination*. For purposes of this subpart, termination is the switching of local telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) *Reciprocal compensation*. For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier.

47 C.F.R. § 51.703. Reciprocal compensation obligation of LECs.

(a) Each LEC shall establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic with any requesting telecommunications carrier.

(b) A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.